

A TREATISE
ON
QUESTIONS OF LAW AND FACT,
INSTRUCTIONS TO JURIES
AND
BILLS OF EXCEPTIONS.

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MARRIED WOMEN," ETC.

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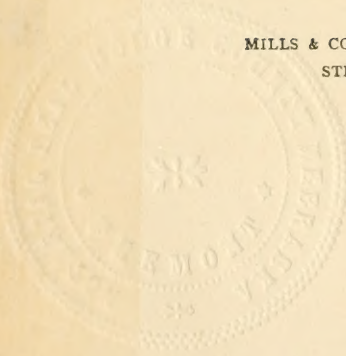
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PREFACE.

I ALWAYS read a preface, and, therefore, take it for granted that all other persons do the same thing. So I shall not indulge in the rather common affectation of remarking that a preface, though a necessary part of a book, is apt to be passed over without interest. This one is set down here for the very purpose of being read the first thing in order; and I shall expect every one who has occasion to use this volume to comply strictly with this expressed design. It must by no means be omitted. So much for "preliminary egotism."

Evidently, a primary object in the preparation of legal text-books is, to enable younger attorneys to avail themselves of the experience of their predecessors and contemporaries. And, besides, since it is plain that as adjudications all relate to points which have been controverted, and which have been made the basis of carrying causes to the appellate courts, the same points, and the same doubts thereon, are always liable to occur again in practice; and hence, by having at hand, in a compendious form, the results which have been reached, much labor, and many mistakes leading to loss, may be avoided.

And, in preparing causes and arranging evidence, it is very important to entertain clear ideas of the forum to which particular questions must go for determination. And, also,

correct knowledge of the due methods of instructing juries, and of objecting to supposed erroneous rulings of the court, will greatly facilitate safe practice and prompt results in the management of litigation. Indeed, instructions and bills of exception ought to be drawn with as much care as pleadings. Bills of exception *are* pleadings in appellate courts.

The present work has been written with as much conciseness as was judged consistent with a clear presentation of the topics therein embraced. And many more cases have been examined than found a place, since I have not been anxious to note all merely confirmatory decisions, but rather variations and discrepancies. Wherever the reader does not find marks of dissenting opinions on the various matters presented, he may be sure that I have not discovered such in my careful research of the Reports.

Hoping that, in a humble degree, this work may be regarded as a tribute to that "duty which every man owes his profession," I submit it to the candid generosity of my brethren.

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A

TREATISE ON LEGAL TRIALS.

PART I.

QUESTIONS OF LAW AND FACT.

CHAPTER I.

GENERAL RELATION OF THE COURT AND JURY.

§ 1. IN the trial of causes, it is the usual province of the court to determine all questions concerning the *pleadings* and the *issues* made thereby. As, for example, what issues are made by the pleadings,¹ and what the allegations are, and whether denied or not.² And the construction and effect of these allegations,³ as also the nature of the action, and of the plaintiff's demand.⁴

§ 2. And the *law* of the case is with the court, while the *facts*, if controverted, are exclusively for the determination of the jury. And herein it is the duty of the court to instruct the jury on the law as applicable to the case in hand, stating the principle

¹ 15 Iowa, 561.

² 4 Iowa, 154.

³ 3 Met. (Ky.) 51.

⁴ 5 Iowa, 272.

of liability, the burden of proof, the presumptions of law in certain circumstances, and the nature and application of the rules of evidence; and then, where the "question is one of fact, about which different minds may honestly differ, it is the province of the jury ultimately and definitively to decide. Upon them the constitution and the laws have placed the responsibility, and upon them it must rest."⁵ Mixed questions of law and fact are for the jury also, under the instructions of the court;⁶ they looking to the court for the law, and to the evidence for the facts,⁷ unless there is a demurrer to the evidence.

In a case in Tennessee, the counsel for the defence maintained that the jury were, in civil causes, judges of law and fact, and were, accordingly, at liberty to disregard the opinions of the Supreme Court, and the instructions in the case; so that, while they would pay respect to the opinions of the courts, indeed, yet they might make the final decision for themselves, independently; but the court said that this proposition was of dangerous tendency, and not permitted by the laws of the state.⁸ But, anciently, it seems that the jury did, in all cases, determine matters "without the observance of any practical distinction between the law and the facts of the case."⁹ But this is now settled the other way, with certain exceptions, which I will note hereafter. And so, the jury have no discretionary power to find as matter of fact, any more

⁵ 15 Pickering, 295.

437; Green v. Hill, 4 Texas,

⁶ Whirley v. Whiteman, 1 465.
Head (Tenn.) 610.

⁸ McCorry v. King's heirs, 3
Humphrey, 270.

⁷ Masser v. Fingle, 29 Mo.

⁹ State v. Crateau, 23 Vt. 22.

than, *expressly* or *avowedly*, matter of law;¹⁰ nor can a counsel be permitted to argue the correction of an instruction to the jury. In a case in Virginia, wherein this was attempted, the Court of Appeals remark, "It is a duty which the court owes to its own self-respect, as well as to the speedy administration of justice, not to allow counsel to discuss before the jury the same matter which has been already decided by it."¹¹

§ 3. The mutual *powers* and *responsibilities* of the court and jury are these, therefore: The jury is morally bound to be governed by the instructions of the court, and is not to inquire whether these are right or wrong. The remedy for wrong instructions is by exception and appeal.¹² And the judge cannot correct a verdict rendered. So, where, in an action on an injunction bond, the jury, by the instruction of the court, considered certain items of damage which ought to have been excluded; and thereupon a motion was made for a new trial, on which the judge revised the verdict, and reduced the amount by the sum claimed on the bad counts, it was held that this was an invasion of the province of the jury.¹³ While the punishment of juries by attain was in vogue, the jury might give a general or special verdict, but the former was held to be dangerous by Lord Coke, who says, "Although the jury, if they will take upon them the knowledge of the law, may give a general

¹⁰ Wilson v. Inloes, 6 Gill (Md.) 168.

¹¹ Delaplane v. Crenshaw, 15 Gratt. 481.

¹² Jewett v. Smart, 11 Iowa, 506.

¹³ Brown v. Jones, 5 Nev. 374.

verdict, yet it is dangerous for them to do so; for, if they mistake the law, they run into the danger of an attain; therefore, to find the special matter is the safest way, where the case is doubtful." (Coke on Litt. 228 b.)

§ 4. Attaint being done away, the errors of a jury can only be reached by the court in the way of correction, by a new trial. "It is within the province, and often the duty, of the court to set aside a verdict where it appears to be contrary to the weight of evidence. On a first trial, there may be room to believe that the jury may have fallen into some error in regard to the law, or in regard to the nature and force of the evidence, which they themselves would correct, upon a careful revision. So it may happen that, on a first trial, when the cause is new to the counsel and the court, the parties and counsel may set forth their respective grounds less definitely and clearly, and the court may instruct less fully and definitely than after the cause has been revised by the whole court, and the grounds of law and the rules respecting the admission and application of the evidence deliberately considered in reference to the particular case. Under these circumstances, it may often be expedient to grant a second, and sometimes even a third, trial. . . .

"This class of cases, however, is clearly distinguishable from another, in which the court may be called upon to interpose its authority in a more persevering manner, to prevent a judgment from being entered on a verdict plainly illegal. There are cases where, by the ordinary forms of proceeding, the issue must

go to the jury, but where it depends upon a few facts which are plainly proved, and stand uncontradicted, and where the rules of law applicable to such facts are plain and well settled, and where, therefore, the verdict must obviously be found one way, or be manifestly wrong; as, in a case of trover, or breach of contract, in which the law has settled a rule of damages, and the evidence is uncontradicted. It depends upon computation on certain data. Still the assessment of damages is strictly within the province of the jury, and they must pass upon it. Should the jury persist either in refusing to find the proper damages, or in finding arbitrary or vindictive damages, under a supposed general power to assess damages, it would, undoubtedly, be the duty of the court to refuse to enter a judgment upon such a verdict, and to set it aside as often as it should be thus returned.”¹⁴

§ 5. The court cannot strike out a plea on the ground that it is not sustained by the proof. “If the court, after the evidence was all heard, were to assume to strike out a plea because it was not sustained by the proof, the right of the jury to try issues of fact would be violated, and trial by jury thus terminated. This has never been indulged, and cannot be, so long as trial by jury obtains. The court has the right to inform the jury what facts must be proved to sustain the issue, but not to determine whether such facts have been established; and if the court thinks they have not, to take the issue from the jury by striking out the pleadings.”¹⁵ Yet where, in an action

¹⁴ Eastman v. Cooper, 15 Pick. 294.

¹⁵ Orne v. Cook, 31 Ill. 238.

on a recognizance, the plea of *nul tiel record* was overruled after verdict rendered, it was held proper on the ground that the jury had not acted upon it. The court said, "The recognizance was put in evidence at the trial, but judgment was not pronounced on the plea till after the verdict. The plea to the court and the pleas to the country were tried at the same time, but not together — the one by the court and the other by the jury. After verdict for the plaintiff, the court gave judgment for him specially on the plea of *nul tiel record*; and this was less irregular than our peculiar practice generally is. When the verdict is for the plaintiff, and his replication of *habetur tale recordum* is also sustained on inspection, the course is to enter judgment for him generally, as it disposes of the whole case; if the plea is sustained, judgment is entered for the defendant, *non obstante veredicto*. Though it would have been an irregularity had the jury determined it, it would not have prejudiced the defendant, and consequently not have been cause for reversal."¹⁶

§ 6. To take a verdict subject to the opinion of the court is held contrary to the theory of trial by jury, when facts are to be deduced from disputable or uncertain evidence.¹⁷

§ 7. There are some exceptions to the general rule as to the decision of law and fact in a case. It seems that Georgia adheres to the ancient rule, that in all civil causes (as well as criminal) the jury are to determine law and fact, subject only to the restriction

¹⁶ Rhoads v. Commonwealth,
15 Pa. St. 276.

¹⁷ Brower v. Orsa, 2 Bosw.
(N. Y.) 367.

of the power to grant a new trial, and so the law may be discussed to the jury.¹⁸ And the exceptions in criminal causes will be considered specially in the following chapter. And thus where a statutory requirement concerning a notice of sale entered into consideration, the Supreme Court of the United States decided that this was within the province of the jury, as being a mixed question of law and fact.¹⁹ Where the statute required the signature of five proprietors of a meeting-house to sign an application to a justice of the peace to call a meeting of the whole proprietors, it was held to belong to the court, and not the jury, to decide whether five proprietors had signed as required.²⁰ This was, however, on the ground that it is the function of the court to decide all questions on the admissibility of evidence, even questions of fact. In New Jersey, it seems, the court, or jury, may pass upon the question as to whether an arrest or imprisonment was for a cause of action, or damages recovered, for seduction.²¹

§ 8. A judge necessarily has a great degree of legal discretion intrusted to him, in order that the laws may be enforced, and justice and equity be meted out to all citizens and claimants. This discretion, however, is not merely arbitrary, but is to be exercised in accordance with the known principles and rules of law. And so, where a jury returns a verdict responsive to the issues, the judge has no discretionary

¹⁸ Robinson v. Adkins, 19 Geo. 401.

²⁰ 9 Cush. 511.

²¹ Wallace v. Coil, 4 Zab. 602.

¹⁹ Cooley v. O'Connor, 12 Wall, 400.

power to set aside the verdict, upon his own motion; although it may be against his instructions, and against the weight of evidence. This power of setting aside verdicts exists only to be invoked by a party aggrieved, and the entry of a judgment upon a valid verdict, has nothing discretionary in it, but is merely a ministerial act, for the performance of which a writ of mandamus will issue if necessary.²²

§ 9. As to chancery proceedings, it is held, in Pennsylvania, that if the judge in his discretion submit issues to a jury, their verdict is merely advisory. The court say, "Especially, in a case where a trust, or the conversion of an absolute deed into a mortgage, is attempted to be made out by parol evidence, the court and jury exercise the functions of a chancellor, and the evidence, assuming the testimony of the witnesses to be true, ought to be such as would satisfy his conscience. 'The judge alone is the chancellor. The province of the jury is to aid him in ascertaining the facts out of which the equities arise. If the facts are not disputed, he is to declare their effect, and determine whether the claim or defence is well founded. A chancellor is judge both of the equity and the facts. It is in his discretion whether he will send an issue to a jury. And if he does, their verdict is only advisory. It is not conclusive upon him. Wherever, therefore, upon the trial of an ejectment founded upon an equitable title, the court is of the opinion that the facts proved do not make out a case in which a chancellor would decree a convey-

²² Lloyd v. Brinck, 36 Tex. 1.

ance, it is his duty to give binding instructions to that effect to the jury.' ”²³ In Texas it has been held that the province of a jury in equitable cases is the same as in law courts, and the sufficiency of their verdict will be determined by the same rules.²⁴ In Georgia, in the absence of a distinct chancery court, the intervention of a jury to find the facts is made imperative; and they render a decree upon the merits, instead of mere interlocutory verdicts on special facts — their decree herein answering to a final verdict at law.²⁵

§ 10. Under a code abolishing the distinction between common law and chancery proceedings, it has been held, nevertheless, that these cases which, under the prior common law system were triable by a jury, remain so triable; and, likewise, former equitable actions remain triable by the court alone.²⁶ And it is discretionary in the latter class, whether any issues shall be submitted to a jury.²⁷

§ 11. In statutory courts of special jurisdiction merely, having no common law jurisdiction, it seems that juries are judges of law and fact.²⁸

§ 12. The jury may, it seems, give an extrajudicial opinion at the request of the parties, for the regulation of their conduct; as, for example, concerning a mill and its appendages.²⁹

§ 13. It has been held that, “in all questions de-

²³ *McGinity v. McGinity*, 63 Pa. St. 44.

²⁴ *Wells v. Burnett*, 7 Tex. 586.

²⁵ *Williams v. McIntyre*, 8 Geo. 34.

²⁶ *Ellis v. Kreutzinger*, 31 Mo. 133.

²⁷ *McCullough v. McCullough*, *ibid.* 229.

²⁸ *Chamberlin v. Brown*, 2 Doug. (Mich.) 120, note.

²⁹ *Den v. Wright*, Pet. C. C. 72.

pending upon a general inference from a multiplicity of particular facts, the inference is always one of fact; unless the law has established some fixed rule, — as, six months' notice to quit, or sending notice of the dishonor of a bill by next post, — or where the inference is one which admits of no doubt, so that it will strike all minds alike. In such cases the court may determine it as matter of law, as they do other cases where the tendency of the testimony is all in one direction. But in all cases of doubt of this character, and where the law has fixed no rule, the inference is one to be made by the jury — such are questions of due diligence, skill, reasonable time, probable cause, intention, etc.”³⁰

§ 14. It has been held that a judge has a discretionary right to make inquiries of the jury concerning their findings. The court say, “The presiding justice has a discretionary power to make such inquiries of the jury in relation to the business before them as the proper administration of justice may require. Such has ever been the usage of this court. It sometimes happens that the verdict first returned by the jury is not entirely certain, or does not precisely meet the issue joined, or some of the issues do not appear to be definitely found. In such cases, before the verdict can be drawn in form, it is not only proper, but necessary, to ascertain from the jury the real meaning of their finding, that when the verdict is affirmed, it it may with certainty express the true intent of the jury, or that the jury may again be sent out for further deliberation, if any material question appears not

³⁰ Sessions v. Newport, 23 Vt. 13.

to have been determined by them. And, even after the verdict has been affirmed and recorded, it may be important to the due administration of justice, or to prevent unnecessary litigation, to ascertain whether certain points have been determined, and how they have been determined. It is not uncommon to have several grounds relied upon in a trial, when it cannot be ascertained from the verdict itself upon which ground it was found. In such cases, the court will make the proper inquiries of the jury, that if it appear to be found upon an illegal principle, or if the jury did not all agree upon any one ground, the verdict may be set aside."³¹

§ 15. When a cause is pending in a court which has a jury, their opinion may be taken on any fact arising in the cause.³²

§ 16. It is held that the power of determining facts upon the evidence, is not a mere power of the will, but a power involving the exercise of judgment and discretion; and must be, in a reasonable degree, subject to the restraints of such judgment and discretion; failing in which a new trial may properly be granted.³³ But the court should not interfere in advance with doubts of the jury, by instructing them that the evidence should be clear as well as satisfactory.³⁴

§ 17. Where a law point which ought to have been decided by the court is submitted by the court to the

³¹ *Com. v. Roby*, 12 Pick. 525.

³² *Beard v. Chitwood*, 8 Ind. 505.

³³ *Quisenberry v. Quisenberry*, 14 B. Mun. (Ky.) 484.

³⁴ *Iglehart v. Jemeson*, 16 Ill. 522.

jury, their verdict will not be disturbed if they decide the law point correctly,³⁵ the error of the court thus being cured by the verdict.

§ 18. It will not be presumed that a jury misapprehended the legal effect of the instructions, or failed to conform to them. And where the court even erroneously charged them, yet, if it clearly appears, upon the whole case, that the same verdict must be again rendered, a new trial will not be granted.³⁶

§ 19. The judge is not to state his opinion on the facts. Where, on a murder trial, the judge said, "There was as much evidence that the prisoner had kicked the deceased upon the chest, as upon the face," and then explained by saying that he was simply ruling on the admission of testimony, and added, "This court does not wish to be understood as saying how much or how little testimony there is on any particular point; the whole matter is for the jury, and they will observe for themselves what the testimony is;" it was held fatal to the cause; the court above remarking that an opinion can be conveyed as effectually to the jury incidentally as in an instruction.³⁷

§ 20. The consideration by the court or jury must be entire, embracing the whole case. So, where, on motion, where several issues of fact were involved, and by agreement of parties the whole was submitted to the decision of the court, whereupon the judge entered on the investigation and heard the evidence,

³⁵ *Brock v. King*, 3 Jones Law (N. C.) 45; *Woodbury v. Taylor*, *ibid.* 507.

³⁶ *Walworth v. Readsboro'*, 24 Vt. 265.

³⁷ *State v. Harkin*, 7 Nev. 382.

it was held error for him to pass judgment on some of the issues of fact, and submit the remainder to a jury.³⁸ And so a jury must decide on the whole of a case, having no power to separate a plaintiff's demand, nor by parity of reason, a defendant's defence.³⁹ But where some allegations are proved, and no proof offered on others, those on which proof is offered may be submitted, and the whole case decided on them.⁴⁰

§ 21. Uncontroverted or immaterial facts are not submitted to a jury.⁴¹

§ 22. *Res adjudicata*, when determinable from the pleadings, is a question for the court; when from the evidence, for the jury.⁴² And matters pertaining to the jurisdiction of a justice of the peace is for the court.⁴³ And the matter of costs is usually for the court.⁴⁴

§ 23. A somewhat singular distinction arose, in a recent case in Maryland, as to the action of a court when a case is submitted without the intervention of a jury, and as to the right of the plaintiff therein to take a nonsuit in order to avoid the necessity of an appeal. In the case, a nonsuit was allowed by the court, after pronouncing that on the evidence the

³⁸ *Dumas v. Robinson*, 40 Geo. 354.

³⁹ *Brockway v. Kinney*, 2 Johns. (N. Y.) 210.

⁴⁰ *Jones v. Williamson*, 6 C. B. (N. S.) 924.

⁴¹ *Howard v. Smith*, N. Y. Superior Court. 124; *Thigpen*

v. R. R. 32 Miss. 347; *Switland v. Holgate*, 8 Watts, 385.

⁴² *Betzer v. Killinger*, 46 Pa. St. 44.

⁴³ *Bridgers v. Bridgers*, 69 N. C. 451.

⁴⁴ *Packer*, 24 Iowa, 20; *Guppy v. Commonwealth*, 2 Grant's Cases (Pa.) 66.

plaintiffs were not allowed to recover. The Court of Appeals say thereon, "In jury trials of civil causes, after the jury have agreed, and before the verdict is taken, the plaintiff is called by the clerk, and if he fails to answer in person or by counsel, no verdict is given, the jury are discharged, and judgment of nonsuit passes against him. Up to this point of time, and until the verdict is actually announced by the foreman, in response to the question, 'What say you? do you find your verdict for the plaintiff or for the defendant?' the right to suffer a nonsuit exists; but ceases after the plaintiff has answered, and the foreman announces the verdict. He is called for the purpose of allowing him an opportunity to determine whether he will take a nonsuit, or hear the verdict; and he must then make his election. A nonsuit is, in many instances, of importance, because it gives the party the right to commence the same suit again, and alter its status by additional testimony; whereas, if he answers, and hears the verdict, he must stand on the case as then presented, and rely upon his exceptions, and upon obtaining a reversal of the judgment on appeal.

"The submission of a cause to the court for trial, where the judge acts both as court and jury, does not deprive the plaintiff of his right to a nonsuit; and care should be taken to so conduct the trial as to afford him the same opportunity of exercising it as if a jury were sworn. In the case before us, the judge ruled the proffered testimony inadmissible, and thus far he was undoubtedly determining a question of law proper for the court to decide, if there had been a jury trial. But after ruling out the testimony, he

then said, in the same connection, and as part of the same ruling, that 'the plaintiffs were not entitled to recover;' and this expression is seized upon and construed as a decision of the case on the facts, in making which the judge was acting as a jury, and as being equivalent to a verdict for the defendants, after the plaintiffs had been called and had answered. Though this has been presented with much ability and force by the appellant's counsel, it is not, we think, a just and fair construction of the action of the judge. In Evans' Practice, 402, it is said with entire correctness, that 'the expressions common in English books, that the judge directed a nonsuit, and others of similar import, mean no more than this, that the judge expressed, in that form of words, his opinion that the plaintiff was not entitled to recover; and that the party submitted to a nonsuit rather than the judge should enforce his opinion by a direction to the jury as to their verdict.' If, therefore, this had been a jury trial, and the judge, after ruling out the evidence and ascertaining the plaintiffs had no more to offer, had said he was of opinion they were not entitled to recover, and would direct the jury to render a verdict for the defendants, the right of the plaintiffs then to suffer a nonsuit could not admit of doubt. Giving to this expression of the judge a fair and reasonable construction, and considering the connection in which it was used, and the course of the trial up to that point, we are of opinion it is to be treated as the expression of his opinion as a court that the plaintiffs were not entitled to recover, to be afterwards enforced by his verdict or finding as a jury for the

defendants; and an entry of judgment accordingly; intervening which was the right to a nonsuit. It would have been better practice, as it certainly would have obviated all difficulty in the case, if the judge, after ruling the testimony inadmissible, had withheld any further expression of his opinion, until he had either directed a formal call of the plaintiffs, or asked of their counsel whether they would take a nonsuit, or stand on their exception to his ruling; but failure to observe this more formal procedure cannot deprive the plaintiffs of a valuable right, which, in a jury trial, they could have received after everything here relied on as a verdict had been said by the court. But, as we have said, this expression was not a verdict, either in substance or form, and the ruling excepted to must therefore be affirmed.”⁴⁵

§ 24. The personal knowledge of the jury is not, except in rare instances, to enter into their verdict. Anciently the rule was the reverse of this, and accordingly jurors were required to be chosen from the immediate vicinage. Thus, in a case in Kentucky, where suit was brought on a covenant of warranty in the purchase of a slave, the defendant objected to evidence of unsoundness after the sale, proposed by the plaintiff, unless the slave were produced in court for the inspection of the jury, and maintained the best evidence of extrinsic facts is the evidence of the senses; and so the testimony of witnesses should not be allowed when the thing itself could be exhibited to the jury. It was held, however, by the Court

⁴⁵ Hall *v.* Schuhardt, 34 Md. 15.

of Appeals, on this point, the defendant having excepted thereon, that, notwithstanding the ancient custom, the modern usage was better, and had superseded it, and that the rule requiring the best evidence does not require that the jury should be furnished the means of personal knowledge, or allowed to decide according to the secret results of their own observation, unknown until disclosed in the verdict, and thus free from scrutiny, and almost from responsibility. "We do not say," remarked the court, "that there may not be cases, involving the condition or qualities of particular articles, in which the party having the custody may be permitted, or, perhaps, even required, to exhibit it to the jury, as affording the most satisfactory means of knowledge; but the court must have a discretion, even in these cases, to prevent misconception or imposition. In general, the best means of proof is by the testimony of witnesses who have made personal examination, and in order to place the parties upon a fair footing of equality in this respect, the court would certainly have power, if it were necessary, to require the one having the custody to afford the requisite opportunity for examination by the witnesses of the other."⁴⁶

§ 25. The personal knowledge of jurors as to the character of witnesses shall not enter into the estimate of evidence on which a verdict is based. In a Massachusetts case, the plaintiff's counsel maintained that jurors had a right to act from their own knowl-

⁴⁶ *Clarke v. Robinson*, 5 B. M. R. 563; *Schmidt v. N. Y. Union Fire Ins. Co.* 1 Gray, 535.

edge, as to the character of witnesses, because a witness might have such a character that many of the jury would not believe him, and yet he might not be impeached. But the court held that, in modern times, it is thought more conducive to the proper administration of justice to submit causes to impartial and unbiased jurors, and so to prohibit them from acting on their private knowledge; and that, if any material fact is within the knowledge of a juror, he should be openly sworn as a witness, and subjected to the ordinary modes of examination and cross-examination, that the court and the parties may know on what evidence the verdict was rendered.⁴⁷

§ 26. Nevertheless, it is both impracticable and inexpedient to exclude, in all cases, the personal knowledge and experience of the jury. Especially may these be brought into requisition in estimating damages. The Massachusetts court remarked, in an early case, that "juries would be very little fit for the high and responsible office to which they are called, especially to make an appraisement which depends on knowledge and experience, if they might not avail themselves of these powers of their mind when they are most necessary to the performance of their duties."⁴⁸ This was spoken with reference to damages sustained by land being taken for public use. So of the value of goods in an action of trover.⁴⁹ The principle of distinction is stated to be, that while to the extent

⁴⁷ N. Y. Union Fire Ins. Co. Pick. 166; Parks v. Boston, 1 Gray, 535. 15 Pick. 209.

⁴⁸ Patterson v. Boston, 20 ⁴⁹ Murdock v. Sumner, 22 Pick. 157.

above specified, a "juror may properly call to his aid his personal knowledge, learning, and experience, yet no sanction is given to his acting upon his knowledge of a particular fact known only to himself, and not a matter of common observation or general knowledge."⁵⁰

§ 27. In general, the question of the admissibility of evidence is a question exclusively for the court. But it has been decided in a late case in California that it may sometimes be submitted to a jury, as, for instance, where it depends on the decision of preliminary matters of fact. This is, however, held to be discretionary with the court. "It is enough," say the court, "to authorize such submission to the jury, that there is some proof of the facts on which the right to admit the evidence is predicated." (1 Greenleaf, Ev., § 49). The rule is, that if there be no evidence of authenticity, the instrument cannot be read to the jury, but if there be any fact or circumstances tending to prove the authenticity, from which it might be presumed, then the instrument is to be read to the jury, and the question, like other matters of fact, is for their decision. (11 Phil. Ev., C. H. & E.'s Notes, 503, note.) And when a *prima facie* case of execution has once been made, the court is not to allow the other party to adduce counter proof before the instrument is read, and thus assume to take the question from the jury."⁵¹

§ 28. Direct written evidence goes to the court alone; indirect to the jury. And this distinction is thus illustrated by the Pennsylvania Supreme Court:

⁵⁰ Schmidt v. N. Y. Union Fire Ins. Co. 1 Gray, 536.

⁵¹ Verzau v. McGregor, 23 Cal. 343.

"A writing, as evidence of a relation or right, must be either direct or indirect evidence of it. Statutes, ordinances, wills, assignments for the benefit of creditors, conveyances, and other contracts which declare the right or relation, are direct evidence of it. Letters, contracts, *inter alios*, or *de aliis rebus*, or any other writings demonstrative of facts relevant to the matter in controversy, and tending to show its true character, are indirect evidence of it. All kinds of direct written evidence, statutes, and private writings, are alike in this, that they declare the law of the relation, or part of it, and are to be interpreted by the judge, and not by the jury. He has been trained to that very business, and is chosen and commissioned because of his training, whereas a jury is drawn by lot for the particular occasion, and simply to aid in finding the facts. In this the duty of the judge is exclusive of the jury, because for this his education and his office are superior. It is on the same principle that, when we want evidence relating to particular occupations, we do not call on commodores to tell us of the art and customs of carriers, nor on farriers for those of farmers, nor on physicians for those of fishermen. The indirect written evidence of a relation is usually accompanied by oral testimony aiding or rebutting the inferences desired to be drawn from it, and all such evidence usually goes to the jury together, as evidence on the disputed question; and this was the meaning of Chief Justice Gibson, when he said that 'an admixture of parol with written evidence draws the whole to the jury.' (1 Pa. R., 386.) In relation to indirect written evidence, the judge's duty of

interpretation is usually fulfilled in declaring that the writing is or is not relevant, and does or does not tend to prove the matter in dispute.”⁵² But, in Alabama, it is held that a jury may not pass upon the consistency of parol evidence with a record; which, however, is based upon the general rule that parol evidence is not admissible to vary a record.⁵³ And it is, therefore, not inconsistent with the above in reality.

The principle, then, is, where the meaning of a document depends upon its terms and not on matters of fact *dehors* the document, the question will be for the judge, even although the terms are technical or scientific.⁵⁴

§ 29. But where an ambiguity arises from evidence *dehors* the document, which is plain in its terms, and the ambiguity is in relation to a word or phrase which, taken in a scientific sense, means one thing, and in a commercial sense another, the point arose, in an English case, whether it was for the judge or jury. In the case, which was an action for the infringement of a patent, there was an ambiguity of this kind in the words of the specifications respectively, that in the later patent being “precipitated, or hydrated, oxides of iron,” and in the former “carbonate of iron.” The testimony of experts showed that though “carbonate of iron” existed, yet it was rarely held for sale, on account of its difficulty of preservation, and that what was usually sold for it was in fact a hydrate by absorption; although carbonate would not, in a chemical

⁵² *Miller v. Fitchthorn*, 31 Pa. St. 256.

⁵⁴ *Hills v. Loudon, &c, Co.* 3 Hurl. and Nor. 920.

⁵³ *Thomason v. Odum*, 31 Ala. 111.

sense, mean "hydrate." The court below held that the specification should be construed commercially, not scientifically, and nonsuited the plaintiff, on the ground that "carbonate" commercially meant the hydrate; the court above, after much hesitation, and without deciding the point as to whether it was a question for the judge or jury, set aside the nonsuit, and granted a new trial.⁵⁵

§ 30. As to matters of direct or absolute interpretation, this is for the judge, even where parol evidence is to be resorted to in order to fix the meaning or application of the terms used, or especially to determine the genuineness and authenticity of the document: "As a preliminary to every question of interpretation of a writing, it must be proved, or assumed, that it is genuine and authentic, that it is free from fraud in its creation, that the makers were competent, that the subject matter of it is lawful, and that it is executed according to law; and for these purposes parol evidence is proper in order to put the instrument into the hands of the judge for interpretation and construction. Now, it is essential to all language that it should have objects material, spiritual, or ideal, to which it applies; and as it cannot apply itself to its objects, it is essential that some mind should be sufficiently informed to make the application, else the writing is senseless. Hence it follows that in the very nature of things, the judge must receive, by admissions or by testimony, all the information that is necessary to put him into a position to interpret and construe the writing with

⁵⁵ *Hills v. Loudon, &c., Co.* 3 Hurl. and Nor. 920.

intelligence; that is, to apply it to persons, things, and events, according to the intention under which it was written.

"This proposition is applied to every kind of writing, ancient and modern, legal and moral, historical and scientific; and is often expressed in some such terms as these: The interpreter must, as far as possible, place himself intellectually in the same circumstances of time and place as the author of the writing was in when he wrote it, in order to enter into sympathy with him, and be able to reveal the thought which ignorance of these circumstances must render indistinct and doubtful. This may be illustrated by the case of a will. When it was written, the object of the testator's thoughts were his estate, and the family or friends to whom he desired to leave it. To the judge all these matters must be explained by admissions or by testimony, else he cannot apply it. If the testator appear, in his will, to have expressed himself defectively, a clear knowledge of the persons, things, circumstances, and usages that he most probably had in his mind when he made the will, may remove all doubt. So it is with a statute that is difficult of interpretation, a clear view of the old law, and of the mischiefs that existed under it, may make the interpretation of the new one quite obvious. In this latter case, however, the judge seeks the extrinsic information for himself; in the former, it is furnished to him by testimony.

"More specifically, yet still very generally, the rule may be repeated thus: In order to put the judge into position for interpreting a writing, he must know the language in which it is written, or must have the

instrument translated by an expert into one that he does know; if it contains expressions that are peculiar to some special business, or to some special custom of class or place, he must have them explained in the same way; if it names or describes persons or things unknown to him, he must be informed of them by admissions or testimony; if some expressions are of doubtful meaning in themselves, he may need to be informed of very many circumstances of time and place under which the instrument was written. (1 Greenl. Ev., §§ 277-282.) From this it would seem that the evidence that may be received in order to put the judge into a position proper for intelligent interpretation may be very extensive, yet, in actual practice, it is usually very small; for the matter in dispute defines the extent of the proof, and most writings furnish no reasonable grounds of dispute. A judicial, as well as a military contest, may depend upon the strength of a single position, or upon an indefinite number of minor ones, and very often the active contest lies at a great distance from the real object of the litigation, and is terminated by a skirmish of outposts.

"All the facts and testimony of which we have just spoken, being designed to put the judge into a position to interpret, are therefore to be considered and weighed by him alone. If some of them that are essential are doubtful, they must be found by the jury specially, or be involved in their general verdict, according to alternative interpretations by the judge."⁵⁵

§ 31. But whether a contract has been executed as an escrow is usually a matter for the jury. However,

⁵⁵ *Miller v. Fitchthorn*, 3 Pa. St. 257.

it has been held that where the evidence of that fact is in writing, as where the contract has been signed by one of the parties, and enclosed in a letter explaining the conditional signing, the construction of the evidence is for the judge; also that such evidence was sufficient to show that the contract was intended as an escrow merely to take effect on condition performed.⁵⁷

§ 32. The sufficiency of evidence is for the jury, unless it has no tendency to prove the material facts of the case. "When the whole testimony, if believed, would not in law establish the fact in controversy, the judge might be required to express the legal effect of the testimony as matter of law. But when the evidence has a tendency to establish the controverted fact, though it may not be strong in its support, and the judge may well apprehend that the jury will find it insufficient for the purpose for which it was introduced, the court has not, therefore, the right to weigh it, and determine its insufficiency, as matter of law. On the other hand, if the evidence, upon the most favorable construction for the party offering it, does not tend to show the truth of the proposition stated, it furnishes nothing for the consideration of the jury; and the judge has the same power to say to the jury that it fails in the object sought, that he has to exclude it for irrelevancy."⁵⁸ But the court may not withhold evidence from the jury so as to decide that a certain judgment was void, or rather had no existence; this being deemed a matter of fact.⁵⁹

⁵⁷ *Furness v. Muck*, 3 Hurl. & Nor. 909 (Bramwell, B., *dubitante*). ⁵⁸ *Sawyer v. Nichols*, 40 Maine, 216.

⁵⁹ *Frazie v. Griffee*, 8 Md. 54.

§ 33. In the Eastern U. S. District Court of Pennsylvania, it has been held that the court may comment on the evidence, provided it does not give directions as to the facts.⁶⁰ The court say, "It is a solecism to say that a judge may set aside the verdict of a jury if, in the opinion of the court, it be contrary to evidence; and yet that it is an invasion of the right of the jury over the facts, if the court should present their views of the evidence in order to prevent the error, instead of correcting it. The evidence given on the trial was arranged in the order of the points to be considered, and decided, but its effect was left fully and without prejudice to the jury. The witnesses were named, and the circumstances alluded to which might detract from, or give weight to, their testimony; but their credibility, positive and comparative, was distinctly submitted to the judgment of the jury."⁶¹ But the court should express no opinion as to the sufficiency of evidence, or assume that facts involved in a case are proved.⁶²

§ 34. As to questions arising under foreign law, as, for instance, whether there was slavery in Canada in 1760, it seems these are to be determined by a jury.⁶³

§ 35. As to actions respecting processes of the court, it is held in Alabama that, on a motion before a justice of the peace against a constable and his securities for not returning an execution, which motion was carried into the county court by *certiorari*, the

⁶⁰ U. S. v. 14 Packages, Gilpin, 255, and U. S. v. Sarchet, ibid. 273.

⁶¹ Ibid.

⁶² Reynolds v. Cox, 11 Ind. 268.

⁶³ Charlotte v. Chouteau, 25 Mo. 465.

proceeding being, under the statute, summary, the submission to a jury is not essential, but discretionary with the court, unless a request was made by one of the parties. If the court should submit the case, without such request, it would not be error; but there is no obligation to do so.⁶⁴

But in North Carolina it is held that "due return" means a proper return, made in proper time, and that the court is to decide the propriety of the return itself, leaving to the jury the question of proper time; and it was remarked that "proper time" might involve the consideration of several particulars, as whether the return was made to the clerk's office in the period prescribed by statute, and whether the sheriff was guilty of any negligence, or whether he was prevented by accident or necessity from filing it, and so was excusable for failure.⁶⁵

CHAPTER II.

CRIMINAL TRIALS.

§ 36. THE question concerning this subject most frequently arising in our courts, is, whether the jury are judges both of the law and the facts, and therefore, whether they have a right to disregard the instructions of the courts or not, in making up their verdict. Some of the courts allow an unlimited lati-

⁶⁴ *Condry et al. v. Henley et al.* 4 Stew. & Por. 11.

⁶⁵ *Waugh v. Brittain*, 4 Jones' Law, 471.

tude in this regard, and others maintain that the jury must take the law from the court, and be governed by the instructions precisely as in civil cases. Some have decided first one way, and afterwards another. Some admit that the jury have the right to decide both law and fact, but so restrict the right as to practically withdraw it again.

In the *United States v. Morris*¹ it is held that the jury are bound to conform to the instructions of the court as to the law, and so the counsel could not be allowed to argue to the jury the constitutionality of the fugitive slave law.

In South Carolina it is held that the jury are bound to take the law from the court in capital cases, and the court remarked, in a late case, that if the judge misstate a legal principle, it is easy to correct it by an appeal; but if the jury misconceive the law, there is no remedy.²

New York, with some wavering and self-contradictions, holds the same doctrine. And, in the case of *Duffy v. The People*,³ the matter is elaborately discussed as follows: "I entertain no doubt that it is as much the duty of jurors to be governed by the instructions of the court, upon legal questions, in criminal, as it is in civil, cases. The following are the principal reasons, which lead to the conclusion that the power of juries should be, and is, thus restricted: 1. The selection of jurors from all classes of people whose education and business cannot, as a general rule, have qualified them to decide legal questions, renders it un-

¹ 1 Curtis, 53.

³ 26 N. Y. 591.

² *State v. Drawdry*, 14 Rich. 90.

reasonable, as well as apparently unsafe, to require them to pass upon such questions. 2. If jurors were to determine the law, its stability would be subverted, and it would become 'as variable as the prejudices, the inclinations, and the passions of men.' Every case would be governed, not by any known or established rule, but by a rule made for the occasion. Jurors would become not only judges, but legislators as well. 3. All questions in regard to the admission and rejection of evidence, being questions of law, are required to be decided by the court. If jurors are to decide law and fact, their jurisdiction should extend to these questions, which often control the verdict. 4. Where the jury finds the facts of a case by special verdict, if they also find a conclusion of law different from that which the law would derive from the same facts, the court disregards the conclusion, and gives judgment according to the facts found. 5. If the jury find a verdict in a civil case against law, the court sets it aside. That the same is not done in criminal cases is owing, I think, more to the tenderness of the common law towards persons accused of crime than to any recognized right of jurors to decide legal questions. 6. In all cases, civil and criminal, where only legal questions are raised, as by demurrers to pleadings, demurrers to evidence, special verdicts, bills of exceptions, and motions in arrest of judgment, such questions are decided by the court, and not by the jury. 7. The fact of guilt being ascertained and declared by the jury, the court determines the punishment which the law prescribes for the offence. [Many authorities here given.] The unquestionable power of

juries to find general verdicts involving both law and fact, furnishes the foundation for the opinion that they are judges of the law as well as of the facts, and gives some plausibility to that opinion. They are not, however, compelled to decide legal questions, having the right to find special verdicts, giving the facts, and leaving the legal conclusions which result from such facts to the court. When they find general verdicts, I think it is their duty to be governed by the instructions of the court as to all legal questions involved in such verdicts. They have the power to do otherwise; but the exercise of such power cannot be regarded as rightful, although the law has provided no means, in criminal cases, of reviewing their decisions, whether of law or fact, or of ascertaining the grounds upon which their verdicts are based."

In Massachusetts, the question arose whether the jury law of 1855 made the jury judges of the law and the facts, and the court decided that it was merely declaratory, and made no change; or, if it did make a change therein, it was therefore unconstitutional and void.⁴ For the legislature could not, under the constitution, give the jury any such power, even by a statute providing also that causes shall be tried by the established forms and principles of law, under the superintendence of the court, who should decide upon the admission of evidence, and on all questions of law arising during the progress of the trial, and on collateral and incidental proceedings, and should charge the jury, allow bills of exception, and grant new trials

⁴ *Commonwealth v. Rock*, 10 Gray, 5.

in cases of conviction.⁵ And in a case where the court instructed the jury that "they had a right to bring to their aid, in deciding upon the evidence, all the knowledge they had acquired, and all the information they had derived from any sources open equally to the observation of all," but not as to particular facts; and also that the jury "were to decide the case, on their oath, according to the evidence; they had received the testimony of the facts from the witnesses upon the stand; and the court now instructed them that the section of the law on which the prosecution was founded was unconstitutional; and that was the only evidence of the law introduced into the case, and the jury were bound to consider it as evidence of the law, as they did the other evidence in the case upon the matters submitted to them to decide, and they would try the case according to the evidence;" on which the defendant excepted, it was held that the only error in the instructions was, that they were too favorable to the defendant, so that she had no legal cause to complain.⁶ And the whole matter was reaffirmed in 12 Gray, 29.

In Ohio, it is held that the jury are under obligation to conform to the instructions of the court.⁷ And so in Alabama.⁸ And New Hampshire.⁹ It was formerly so held in Indiana,¹⁰ but the reverse prevails now.¹¹ In Arkansas the court say, "If the court had charged

⁵ Commonwealth *v.* Authes, 5 Gray, 185. (Dewey and Thomas, J.J., *dis.*)

⁶ Commonwealth *v.* Lawrence, 9 Gray, 135.

⁷ Robbins *v.* State, 8 O. St. 131.

⁸ Batre *v.* State, 18 Ala. 119.

⁹ Pierce *v.* State, 13 N. H.

119.

¹⁰ 2 and 4 Blackford, 151,

247.

¹¹ 10 Ind. 276, 503.

the jury that they were bound to receive the law when given from the court, but that, in cases where the issue involves a mixed question of law and fact, they are necessarily the judges of the law and testimony, because they must apply the law to the testimony, in order to determine the criminal intent with which the act was done, it would have saved to the defendant the full benefit of his right to an impartial trial by jury, and the court would, at the same time, have maintained its own dignity and its constitutional authority. If, in any case, the jury are subject to the outside pressure of popular excitement against the accused, the right of the court to declare what the law is, and the duty of the jury so to receive and apply it to the facts they find to be proven, may be the only shield and protection that are left to him. The case here does not call for any discussion of the proposition that the jury are the judges of the law and the evidence. Supposing it to be an error, it is one of which the appellant cannot complain; and we only notice the charge, because, if taken in the literal and commonly received acceptation of the terms used, it becomes a heresy that is subversive of all law.”¹²

In Vermont, on the contrary, it is held that “the history of English criminal jurisprudence furnishes abundant evidence, not only of the necessity of watchfulness, but also that the power of juries to determine the law as well as the facts, in criminal trials, was essential to the protection of innocence and the preservation of liberty. In trials for state offences, espe-

¹² *Pleasant v. State*, 8 Eng. 372.

cially, the bias of the judges was always strongly in favor of the crown; and, in most cases, their partiality was such that there was no security against the conviction of any person the government might accuse, but the integrity and independence of jurors. The question of the guilt or innocence of the accused being compounded of law and fact, it was in the power of the court to shape the law to meet the proof; and if the jury would but submit to the direction of the judges in regard to the law, there was little or no chance for the escape of the prisoner, however weak the evidence might be. Of this, numerous examples might be given; but they are too well known to the readers of English history to make it necessary to specify them.

"It is this supposed independence of jurors, in criminal cases, that has commended the English system of jury trial to the favor and eulogium of enlightened foreigners, and has procured its introduction into some of the more liberal governments on the continent. The celebrated De Tolme, in his work on the Constitution of England, which he appears to have thoroughly studied, published in 1784, holds the following language: 'As the main object of the institution of trial by jury is to guard the accused persons against all decisions whatsoever by men invested with any permanent official authority, it is not only a settled principle that the opinion which the judge delivers has no weight but such as the jury choose to give it, but their verdict must besides comprehend the whole matter in trial, and decide as well upon the fact as upon the point of law that may arise out of it; in other

words, they must pronounce both on the commission of a certain fact and on the reason which makes such fact to be contrary to law.' It is obvious that the English system of jury trial would, in the estimation of this enlightened commentator, be shorn of its chief value if the right of deciding upon the criminality of the fact proved were wrested from the jurors and transferred to the judges."¹³

In Georgia, it is held that the jury are not bound by the opinion of the court as to the law.¹⁴

In Maryland, the clause of the constitution, "In the trial of all criminal causes, the jury shall be the judges of law as well as fact," has been held merely declaratory, and hence as making no change in the law.¹⁵ At first view, this looks like an evasion by the court; but the court explain thus: "The debates which took place in the convention that framed the constitution show what were the reasons that induced the adoption of the section. It is apparent from these debates that opposing views as to the powers of a jury in a criminal case prevailed in different parts of the state, and that to guard in the future against such conflict, the provision was inserted in the constitution. It was well known that some members, both of the judiciary and the profession, held that juries, in criminal cases, were the judges of law as well as of fact; whilst others held a directly contrary opinion. It is not now important to inquire on which side there was a preponderance of authority and reason. When the

¹³ *State v. Crateau*, 23 Vt. 21.
(Bennett, J., *dis.*)

¹⁴ *McPherson v. State*, 22 Ga.
478.

¹⁵ *Franklin v. State*, 12 Md. 245.

meaning of the terms is fixed, there is an end of controversy in regard to the relative powers of court and jury.

“So far as I know, there is no instance in which a court admitted that the words ‘judges of law as well as fact’ authorized the jury to decide on the constitutionality of a law. With those who insisted on the enlarged power conferred by the words in our constitution, there was no pretence that it authorized a judgment by a jury of the constitutionality of an act of Congress or of the state legislature. All they contended for was, that in a criminal case the jury were not bound to abide by the interpretation of the court of the meaning of a law, but were free to construe and apply it according to their own judgments. They never pretended that the jury had the right to decide on the constitutionality of an act defining murder, arson, or any other crime; but that they had the right to affix their own meaning on the particular law, and to determine for themselves whether the facts proven brought the traverser within that meaning. The words of the constitution have no greater significance since their incorporation into the organic law than they had previously; and I think I have given to them the broadest latitude ever sanctioned or seriously countenanced by any respectable authority.” This very plainly and conclusively sets forth a restriction upon the judgment as to law of a jury in a criminal case, namely, that they cannot pronounce on the constitutionality of a law; and the decision of the court was called for by an exception to the ruling of the court below in refusing to allow counsel to argue

to the jury the question of constitutionality. But to me it would seem this very restriction, with others of a similar nature, determines the whole matter against the power of the jury to judge the law independently of the court.

In Mississippi, the doctrine is denied; and the court say, "In many of the colonies, immediately preceding the revolution, the arbitrary temper and unauthorized acts of the judges holding office directly from the crown, made the independence of the jury in law, as well as fact, a matter of great popular importance. From this cause, the doctrine embodied in the charge under consideration grew into recognition, and for some time after the adoption of the federal constitution it was generally received. It is unnecessary to notice the course of judicial decisions on this subject. It is scarcely necessary to state that, in no great while after *Frei's* case, in which the doctrine was fully recognized by the court, who charged that 'the jury are to decide on the present, and in all criminal cases, both the law and the facts, on their consideration of the whole case,' the courts, one after another, abandoned the doctrine.* In England, it has always been held that the courts were as much the judges of the law as in civil cases.† And this doctrine is now undoubtedly sustained by the great weight of authority. (Am. Cr. Law, 896.)" ¹⁶

* But the progress of some courts has been in the opposite direction; as, for instance, in Indiana.

† True; but held there that in both civil and criminal cases the jury were judges of the law, so that the affirmation is hardly in point here.

¹⁶ *Williams v. State*, 32 Miss. 396.

The doctrine is denied in Kentucky; and the court say, "Juries have the power, but not the right, to disregard the law as expounded to them by the court, and render a verdict of not guilty in a case where the law, if correctly administered, would result in a conviction; and their decision in such a case will be final because a new trial cannot be awarded by the court. But such an improper exercise of power on their part does not tend to prove that they are not bound to consider the instructions of the court as containing the law of the case." ¹⁷

In Iowa, the jury may determine law and fact, but under instructions by the court. ¹⁸ In Tennessee, this charge was sustained: "The jury are not only the judges of the facts in the case, but they are the judges of the law. The court is a witness to them as to what the law is; after the court has stated the law to them, then, if they believe it to be different, they can disregard the opinion of the court. If the judge is against the defendant, his judgment can be reversed by the supreme court; if the jury errs in favor of the defendant, their judgment is final, and cannot be reversed in the supreme court." ¹⁹

In Louisiana, it is held that "it doubtless would be a safe rule for the jury to take the law from the judge as their guide, but they are not bound to do so." ²⁰ And if the court refuses to charge the jury that they

¹⁷ Commonwealth v. Van Tuyl, 1 Met. 5.

¹⁸ Forshee v. Abrams, 2 Clarke (Iowa), 580.

¹⁹ Nelson v. State, 2 Swan, 486.

²⁰ State v. Jurche, 17 La. An. 72.

are judges of the law and fact, their verdict, in case of conviction, will be set aside on appeal.²¹

In Illinois it is held that the jury are uncontrollable judges of the law and facts. But Justice Walker, in *Fisher v. People*, delivered a very cogent dissenting opinion, of considerable length, coinciding with the remarks of Judge Story, quoted below. In the same case, the majority of the court say, "The power is conferred in the most unqualified terms, and has no limits which we can assign to it. We have said, in the case of *Schnier v. People*, *ante*, p. 17, that being judges of the law and the fact, they are not bound by the law as given to them by the court, but can assume the responsibility of deciding, each juror for himself, what the law is. If they can say, upon their oaths, that they know the law better than the court, they have the power to do so. If they are prepared to say the law is different from what it is declared to be by the court, they have a perfect legal right to say so, and find the verdict according to their own notions of the law. It is a matter between their consciences and their God, with which no power can interfere. There can be no apprehension in so looping this power, for an erroneous decision of the jury against a prisoner can be corrected by the power remaining in this court to award a new trial."²²

I close this review (which I have thought needful to present somewhat fully) with the remarks of the justly-renowned Judge Story, uttered in the year 1835, in charging a jury in the United States Circuit

²¹ *State v. Salika*, 18 La. An. 35.

²² *Fisher v. People*, 23 Ill. 294.

Court. "Before I proceed to the merits of this case, I wish to say a few words upon a point suggested by the learned counsel for the prisoner [Daniel Webster and C. P. Curtis], upon which I have had a decided opinion during my whole professional life. It is, that in criminal cases, and especially in capital cases, the jury are the judges of the law, as well as of the fact. My opinion is, that the jury are no more judges of the law in a capital or other criminal case, upon the plea of not guilty, than they are in every civil case tried upon the general issue. In each of these cases, their verdict, when general, is necessarily compounded of law and of fact, and includes both. In each, they must necessarily determine the law, as well as the fact. In each, they have the physical power * to disregard the law as laid down to them by the court. But I deny that in any case, civil or criminal, they have the moral right to decide the law according to their own notions or pleasure. On the contrary, I hold it the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law. It is the duty of the court to instruct the jury as to the law, and it is the duty of the jury to follow the law, as it is laid down by the court. This is the right of every citizen, and it is his only protection. If the jury were at liberty to settle the law for themselves, the effect would be not only that the law itself would be most uncertain, from the different views which different juries might take of it, but, in case of error, there

* Rather mental power, I suppose.

would be no remedy or redress by the injured party; for the court would not have any right to review, as it had been settled by the jury.* Indeed, it would be almost impracticable to ascertain what the law, as settled by the jury, actually was. On the contrary, if the court should err in laying down the law to the jury, there is an adequate remedy for the injured party by a motion for a new trial, or a writ of error, as the nature of the jurisdiction of the particular court may require. Every person accused as a criminal, has a right to be tried according to the law of the land; the fixed law of the land; and not by the law as a jury may understand it, or choose, from wantonness, or ignorance, or accidental mistake to interpret it. If I thought that the jury were the proper judges of the law in criminal cases, I should hold it my duty to abstain from the responsibility of stating the law to them on any such trial. But, believing as I do that every citizen has a right to be tried by the law, and according to the law,—that it is his privilege and truest shield against oppression and wrong, I feel it my duty to state my views, fully and openly, on the present occasion. It is not, indeed, an occasion on which there is any reason to doubt but that an intelligent jury can understand the principles of law applicable to the subject, as well as the court; for they are the principles of common sense. And as little reason is there, in my view, to suppose they

* This seems inconclusive, since the court might review the decision of the jury on law, as well as now upon fact. Verdicts may be set aside because not according to the evidence.

can operate injuriously to the real merits of the case of the prisoner.”²³

On the whole, the weight of reason and authority appear decidedly to support the views of those who deny the unrestricted, uncontrollable right of a jury to decide the law in a criminal case. Yet all agree that, if a jury usurp such a right, the matter is remediless, where the prisoner is thereon discharged; and so far the only restraint, really or practically, in operation, is a moral, not a legal one. The negative doctrine may, however, often be of practical benefit in cases of conviction, it affording a ground of appeal, when perhaps there is no other. There seems, too, an inherent incongruity, moreover, in the position that the jury are judges of the law, and yet are required to be informed by the court what the law is, the judge being, as one court has expressed it, a witness in the case, so far, as an expert, for the information of the jury. In a measure the jury does determine both law and fact, in all cases, civil and criminal; but that they do so with any better, or more extended right in the latter, than in the former, is certainly more than doubtful.

§ 37. An objection to a juror, if made after the trial, concerning matters existing before the trial, is held, in Virginia, to be addressed to the sound discretion of the court. Thus, in *Jones's case*, wherein the charge was murder, three bystanders were called as jurors, and examined as to their competency in the usual manner. One said he had heard part of the

²³ *United States v. Baptiste*, 2 Sumner, C. C. R. 243.

evidence; the other two knew nothing except from rumor; all declared they had no prejudice against the prisoner, and could try the case fairly and impartially. They were sworn in on the consent of the prisoner. On conviction, the prisoner excepted to these jurors, because of their pre-existent influences, and brought witnesses to prove prior expressions unfavorable to the prisoner, but nothing further than what the jurors had admitted on the *voir dire*. The court certified the matter to the court above, judgment being suspended meanwhile, for the decision thereon. The General Court directed sentence according to the verdict in the case, and gave the ruling stated above, that the sound discretion of the court should be brought into requisition in all such cases.²⁴

§ 38. In Connecticut it was held that the court, even on agreement of parties, cannot try a criminal case without a jury, and where the court, on such an agreement, found the facts, and certified the case to the court above for advice, the court above refused to entertain it.²⁵ In Texas, it has been held that cases of misdemeanor, punishable by fine, are an exception to this rule.²⁶

§ 39. It has been held that a juror may be withdrawn or discharged for cause, before verdict. And the court remarked, in *United States v. Morris*,²⁷ "The rule of the common law, as shown by the defendant's counsel, is, that neither party has a right of challenge, after the juror is sworn, for cause then existing. But

²⁴ Leigh's R. 614.

²⁵ *State v. Maine*, 27 Conn.

281.

²⁶ *State v. Jones*, 18 Tex. 883.

²⁷ 1 Curtis C. C. R. 35

it by no means follows that it is not in the power of the court, at the suggestion of one of the parties, or upon its own motion, to interpose and withdraw from the panel a juror utterly unfit, in the apprehension of every honest man, to remain there. Suppose a prisoner on trial for his life should inform the court that a juror had been bribed to convict him, that the fact was unknown to him when the juror was sworn, and that he had just obtained plenary evidence of it, which he was ready to lay before the court, is the court compelled to go on with the trial? Suppose the judge, during the trial, obtains by accident personal knowledge that one of the jurors is determined to acquit, or convict, without any regard to the law or the evidence, is he bound to hold his peace? In my judgment, such a doctrine would be as wide of the common law as it would be of common sense and common honesty. The truth is that this rule, like a great many other rules, is for the orderly conduct of business. There must be some prescribed order for the parties to make their challenges, as well as to do almost every thing else in the course of a trial. As matter of right, neither party can deviate from this order. And it is the duty of the court to enforce these rules, which are for the general good, even if they occasion inconvenience and loss in particular cases. But there goes along with all of them, the great principle that, being designed to promote the ends of justice, they shall not be used utterly to subvert and defeat it; being intended as a fence against disorder, they shall not be turned into a snare; they do not tie the hands of the court so that when,

in the sound discretion of the court, the public justice plainly requires its interposition, it may not interpose; and it would be as inconsistent with authority, as with the great interests of the community, to hold the court restrained. [English authority is here cited.] But the interposition of the court may be placed on even higher ground, supported by authority which, in this court, is decisive. In *United States v. Percy*, 9 Wheaton, 579, the question came before the Supreme Court whether it was in the power of the Circuit Court to discharge a jury in a capital case, and afterwards put the prisoner on trial by another jury. The distinction between capital cases and misdemeanors, under the provisions of the constitution of the United States, cited by the defendant's counsel, is very plain; yet, speaking even of capital cases, the court say. 'We think that in all cases of this nature, the law has invested courts of justice with authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act; or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject, and it is impossible to define all the circumstances which would render it proper to interfere.' That a court would interfere far more readily in a case of misdemeanor there can be no doubt, and it is so asserted in terms by Story, J., in *United States v. Coolidge*, 2 Gall. 364."

§ 40. But the court must receive a verdict actually rendered, even if regarding it as contrary to the evidence. It has no power to send out a jury to recon-

sider their verdict, as English courts could formerly do.²⁸

§ 41. As to the plea of *autrefois convict* or *acquit* it is held, in New York, that it must go to the jury.²⁹ But in Vermont, it is held that, unless there is a question of the identity of the party, or some such matter of fact, a former conviction [and of course acquittal] is a pure question of law.³⁰

§ 42. An arbitrary discharge of a juror in a criminal proceeding after impanelling, and where there is no proper cause for the exercise of such a discretion upon the part of the judge, is held, in New York, a bar to any subsequent trial on the same indictment.³¹ And so in Tennessee.³² And this is the settled law beyond doubt, although the authorities all agree as to the right of discharging jurors for cause before verdict, as above set forth.³³

§ 43. On circumstantial evidence, it is the province of the jury to find the question of guilt; and it is error for the court to charge that the circumstances, if true, established guilt, or that if they believed the

²⁸ State v. Ostrander, 30 Mo. 20. Barrett, 2 Caines, 308; People v. Green, 13 Wend. 55, 57;

²⁹ Grant v. People, 4 Parker's Crim. R. 534. State v. Waterhouse, Mart. & Ferg. 278; Mary C. Newton, 66

³⁰ State v. Haynes, &c., 36 E. C. L. R. 716; People v. Godwin, 18 J. R. 201; Commonwealth v. Cook, 6 Searg. &

³¹ Grant v. People, 4 Parker's Crim. R. 532. Rawle, 577; State v. Ephraim, 2 Dev. & Bat. 162; 2 Gr. &

³² Mahala v. State, 10 Yerg. 582. Wat. on New Tr. 105; United States v. Pedro Gilbert, 2 Sumn.

³³ People v. Alcott, 21 Johns. Cases, 301; People v. Goodwin, 18 Johns. R. 187; People v.

60.

witnesses, the case is clearly within one of the degrees of manslaughter; and it is for the jury to say which degree.³⁴

§ 44. In a case of perjury, the materiality of a false statement is held, in Mississippi, to be a question for the court; and it is error to submit it to the consideration of a jury.³⁵

§ 45. The jury are to determine the weight, grade, and effect of confessions adduced in evidence. And so, in a trial for larceny, where the evidence was chiefly made up of confessions, it was held error to instruct the jury that "the confessions of the accused of his guilt, when confirmed by circumstances, become the highest evidence of his guilt; and the jury have a right to receive a portion of the confession and reject other portions, if the attendant circumstances, in their opinion, warrant such rejection," — this instruction being regarded as assuming that the statements of the accused amounted to a confession of guilt, and as directing the jury concerning the effect, grade, and weight of testimony.³⁶

³⁴ *Breen v. People*, and *Pfornner v. People*, 4 Parker's Crim. R. 380 and 558.

³⁵ *Cathran v. State*, 39 Miss. 541.

³⁶ *Hagett v. State*, 40 Miss. 522.

CHAPTER III.

CONSTRUCTION OF WRITTEN INSTRUMENTS.

THE general principles relating to our subject being thus set forth in the two preceding chapters, what follows will be largely illustrative of the application of these principles, by showing under what circumstances disputes arose as to the matters to be submitted respectively to the court and jury, and how the points were decided with regard to those circumstances.

§ 46. The general principle is well settled to be, that the construction of the terms of an instrument is matter of law for the court.¹ And the letters and figures thereof.² And where it is a letter embracing a contract,³ or several letters in series of correspondence.⁴ And deeds or patent for land.⁵ And written affidavit.⁶ And lost instruments, where the contents are proved by parol.⁷ Also the legal effect of an instrument.⁸

¹ *Caldwell v. Dickson*, 26 Mo. 61; *Doe ex dem. Holman v. Crane*, 16 Ala. 580; *Kidd v. Cromwell*, 17 Ala. 648.

² *Riley v. Dickens*, 19 Ill. 30. 321.

³ *Ranney v. Higby*, 5 Wis. 70; *United States v. Shaw*, 1 Cliff. 321

⁴ *Valkenburg v. Rogers*, 18 Mich. 190.

⁵ *Cook v. Carroll*, 6 Md. 111.

⁶ *Long v. Rogers*, 19 Ala.

⁷ *Berwick v. Horsefall*, 4 C. B. (N. S.) 450.

⁸ *Carpentier v. Thiston*, 24 Cal. 285.

§ 47. This construction, however, is chiefly confined to the meaning of the words and the grammatical construction of the instrument. "Ordinarily, the meaning of words, and the grammatical construction of the English language, so far as they are established by the rules and usages of the language, are *prima facie* matter of law, to be construed and passed upon by the court. But language may be ambiguous, and used in different senses; or general words in particular trades and branches of business may be used in a new, peculiar, or technical sense, and therefore, in some instances, evidence may be received from those who are conversant with such branch of business, and such technical or peculiar use of language, to explain and illustrate it. (*Brown v. Brown*, 8 Met. 576.) 'If the obscurity arises from the obscurity of the writing itself, it is determined by the court alone; but questions of custom, usage, and actual intention, and meaning derived therefrom, are for the jury.' (2 Phil. Ev. § 280.)"⁹ So, if no language is used out of the ordinary signification, and there are no technical terms, or terms of art requiring to be explained by extrinsic evidence, the construction is for the court.¹⁰ And an ambiguity arising from the phraseology cannot be explained by parol evidence, but only that arising from extrinsic matter. This is the settled rule everywhere.

§ 48. Where one instrument is explained by another, it is for the court to construe them together, and direct the jury to find in accordance with the

⁹ *Prather v. Ross*, 17 Ind. 499.

¹⁰ *Eman v. Brown*, 8 Minn. 520.

construction; as where a deed is made in pursuance of a written contract which is adduced to explain the deed.¹¹ Where the instrument is unambiguous, the court is to direct the verdict, and may refuse to submit to the jury whether the consideration of a note was illegal, when it plainly appears to be so on its face, or admit evidence to explain away the illegal intent.¹² And where the facts as to the delivery of a deed are undisputed, the legal effect of those facts is for the court to determine.¹³

§ 49. But where a written instrument is offered in evidence of a fact, or where it is to be considered in connection with the situation of the parties, or with reference to other facts proved by parol, it is to go to the jury for construction as a link in the chain of evidence; as where there are extraneous facts, or correspondence shows only a part of the transaction.¹⁴

§ 50. Dates — as, for example, which of two instruments concerning the same subject, but not referring to each other, and one being undated, was first executed — are held, in New York, to be a question of fact.¹⁵ Dates fixed by court records may be stated to the jury as fact.¹⁶

§ 51. When a signature is disputed, as in an action on a bond,¹⁷ or in a prosecution for forgery, it becomes a question of fact for the jury.¹⁸

¹¹ *Helmholz v. Everingham*, 24 Wis. 269.

¹² *Porter v. Havens*, 37 Barb. 349.

¹³ *Rogers v. Carey*, 47 Mo. 235.

¹⁴ *McKean v. Wagenblast*, 2 Grant's Cas. (Pa.) 465.

¹⁵ *Coons v. Chambers*, 1 Abb. Appeals, 439.

¹⁶ *Andrews v. Graves*, 1 Dillon, C. C. 111.

¹⁷ *Mapel v. Naylor*, 32 N. Y. 669.

¹⁸ *Mosher v. State*, 14 Ind. 262.

§ 52. In Pennsylvania, it is held to be a question of law whether an instrument is sealed or not, and a question of fact whether, if sealed, it is the seal of the corporate defendant, in an action of covenant against a corporation.¹⁹ In Illinois, it is held that it is for the court to decide whether the instrument has a seal, but for the jury to say whether it has been altered by affixing a seal.²⁰ In Alabama, held that the court decides, except where there is such an ambiguity as to call for explanatory parol proof.²¹

§ 53. The distinction of instruments is held, in Maine, to be a question for the court; and also whether the distinction was the result of a dishonest purpose.²² But I doubt whether this would be generally followed as to the second branch. In Texas, it is held that where the records of a probate court have been destroyed by fire, the question whether or not there had been a valid order of sale by the probate court, of land in controversy, is a question of fact for the jury; and that if the jury believed that there was in fact an order of sale, its validity would be presumed until the contrary was shown;²³ which seems like a swinging to the other extreme, as it is settled that the existence of a record is for the court²⁴ on the issue of *nul tiel record*, and that the validity of an order appointing an administrator is for the court to

¹⁹ Crossman v. Turnpike Co.,
3 Grant's Cas. 225.

²⁰ Schwartz v. Herrenkind, 26
Ill. 213.

²¹ Moore v. Leseur, 18 Ala.
609.

²² Tobin v. Shaw, 45 Me.,
quoting 1 Stark Ev. 354.

²³ Sapp v. Neusom, 27 Tex.
541.

²⁴ Ridley v. Buchanan, 2
Swan (Tenn.) 556.

decide, not for the jury.²⁵ In New York, it is held that the destruction of a note not negotiable is a question of fact.²⁶

§ 54. Whether a sale was by the acre or by the gross is held, in Texas, as a question of law, depending on the construction of the deed or contract.²⁷

§ 55. Where a written receipt was given to a grantor by a grantee on receiving a deed, the receipt acknowledging the passing of the deed, and promising to return it to the grantor on demand, or pay him in money the consideration expressed in the deed, the effect of the receipt was held to be a question of law; and no demand for the return of the deed having been made, it was accordingly held that the title vested in the grantee.²⁸

§ 56. An inference from instruments, introduced as evidence of facts, is within the province of the jury. In a case in Missouri, the court say, "The jury were the proper judges of the inferences of fact to be drawn from the papers. The legal effect of papers is to be determined by the court; but when documents are offered in evidence as the foundation of an inference of fact, whether such inference can be drawn from them is a question for the jury. The most authentic documents, when offered for such a purpose, become no more than letters, or a written correspondence, which, when offered in evidence to prove a fact, are always to be interpreted by the jury. When doc-

²⁵ *Sims v. Boynton*, 32 Ala. 361.

²⁶ *Des. Arts v. Leggett*, 5 Duer, 161.

²⁷ U. S. Dig.

²⁸ *Howe v. Dewing*, 1 Gray (Mass.), 479.

uments are offered for such a purpose, they, like a written correspondence, may be explained by extrinsic evidence. The petition of Gamache, whether on behalf of himself or the inhabitants of the village, being made the foundation of an official act, it, together with the act, was evidence for the jury, to have such weight as, under all the circumstances, they might deem it entitled to.”²⁹

§ 57. Whether an absolute conveyance was intended for a mortgage has been held a question of fact for the jury.³⁰ But *contra*, in North Carolina.

§ 58. And in Pennsylvania it has been held that a jury may determine what property is included in a real estate mortgage. Thus, where a railroad company held town lots next their track for the purpose of a basin to form a connection with river navigation, and mortgaged their road with all its corporate privileges and appurtenances without naming the lots specifically, and where the mortgage was foreclosed, and nevertheless afterwards the lots were sold under execution, in an action of ejectment by the execution purchasers against the mortgage purchasers, the question arose whether the lots were included in the “appurtenances” of the road, as essential to its franchises; and this question was submitted to the jury. Held not to be error.³¹

§ 59. Where there is ambiguity in the terms of a will, it has been held, in Maryland, that it is for the

²⁹ *Primm v. Haren*, 27 Mo. 205. *Contra*, N. C. R. 12 Ired. 211. 443.

³⁰ *Horne v. Puckett*, 22 Tex. ³¹ *Shamokin R. R. v. Livermore*, 47 Pa. St. 465.

jury.³² This was a case in which the testator devised "a lot of ground lying on the east side of Leadenhall Street, in Ridgeley's addition to Baltimore town." The court say, "For the purposes of this case, it is sufficient to refer to the decision of the Court of Appeals, in *Walston's Lessee v. White*, 5 Md. R. 297, where the rule is thus succinctly stated: 'Where the language of a testator is plain and unambiguous, such language must govern; and therefore extrinsic evidence is inadmissible to show that he meant something different from what his language imports; but any evidence is admissible which, in its nature and effect, simply explains what the testator has written; in other words, the question, in expounding a will, is not what the testator meant as distinguished from what his words express, but simply what is the meaning of his words. And extrinsic evidence in aid of the exposition of his will must be admissible, or inadmissible, with reference to its bearing upon the issue which this question raises.' (Wigram's Rules of Law.) "

§ 60. To whom credit was given on the following order,¹—

"January 7, 1852.

"MESSRS. TURTON & LESCOMB: Please let A. Boughton have the fulling mill crank, and other work for Thomas Murray. WALTER BURKE,"—

was held to be a question of fact for the jury, to be determined by the aid of extrinsic evidence.³³

³² *Warner v. Miltenberger*, 21 Md. 272.

³³ *Turton et al. v. Burke*, 4 Wis. 120.

§ 61. The character of letters of administration is for the court.³⁴

§ 62. In Massachusetts, a reservation in a lease was left for the construction of the jury, or at least their application, under the following circumstances. Under a lease for years, of a building, machinery, and water power, the lessor reserved one room, with the privilege of running a saw and lathe therein. The lessee brought an action against the lessor for so using the room reserved as to hinder the lessee in using the remainder. On the trial, it was held that the reservation was to be construed so as to enable the lessee to carry on the business of his factory; that evidence of the manner in which the reserved water power had been previously used was admissible to show a reasonable limitation of the right reserved; that it was for the jury to determine whether the saw used by the lessor required more power than was included in the reservation; that the damages were to be assessed according to the value of the lease, and not estimated by the amount of rent, or of the lessee's profits; and that, on the question of damages, the condition and capacity of the works might be shown. And these rulings were sustained.³⁵

§ 63. Evidence of the loss of an instrument is addressed to the court for the determination of the admission of secondary evidence. And then the existence of the instrument as a ground of action is a matter for the consideration of the jury afterwards.³⁶

³⁴ *Fell's Point, &c., v. Weedon*, 18 Md. 328.

³⁶ *Hill v. Barney*, 18 N. H. 608.

³⁵ *Dexter v. Manley*, 1 Cush. 15.

CHAPTER IV.

INTERPRETATION OF LAWS, &C.

§ 64. THE constitutionality of any legislative act is exclusively for the court; neither the expediency or propriety thereof, nor the motives which gave rise to it, nor its conformity with the constitution, being matters of fact for a jury. And where the city of Covington was extended, under a legislative act, and none of the material facts of the extension was controverted, the question whether, on those facts, the act of incorporation and the assessment of tax under it, were valid and constitutional, was held to be a conclusion of law, which might be at once announced by the court to the jury. But in connection with this, the actual condition of the town with regard to territory, population, and locality, was held to be the facts which, if controverted, were to be found by the jury.¹ And so, in the matter of construction, whether a statutory clause is directory or imperative, is not for the jury.² And in a case where the court submitted to the jury whether there was such a sale as was required by the act of 1817, it was held, on appeal, that therein the court erred in thus constituting the jury judges of the law, it being the duty of the

¹ *Maltus v. Shields*, 2 Met. (Ky.) 557.

² *Board v. Heenan*, 5 Minn. 336.

court itself to expound and interpret the provisions thereof.³

§ 65. The question of legal jurisdiction belongs to the court, except where facts are to be passed upon by the jury before that question arises; and so, if the jurisdiction depends on the existence of facts, the jury may, under the direction of the court as to matter of law, find by general verdict whether there is or is not jurisdiction.⁴

§ 66. What is lawful money is exclusively for the court. And so it was held error to instruct the jury to find for the defendant "if they were satisfied he was prepared and offered to pay the sum demanded in lawful money of the United States other than gold and silver coin," — this leaving to the jury to decide what is lawful money.⁵

§ 67. Foreign laws are not judicially noticed. If they are unwritten, they may be proved by parol, and there is no presumption that they are in writing. If they are written, they must be produced and properly authenticated. When adduced in evidence, the judge is to construe such laws; and the construction is to be controlled by the construction given within the jurisdiction where they are in force; and, for this purpose, the opinions of text-writers, the decisions of the courts, and the testimony of experts may be resorted to.⁶ Yet it has been held that the existence of slavery by law in Canada was a fact for the jury;⁷

³ Clarke *v.* Marriott, 9 Gill, (Md.) 337.

⁴ United States *v.* Sanders, 1 Hemp. C. C. R. 486.

⁵ Chesapeake Bank *v.* Swain, 29 Md. 502.

⁶ Charlotte *v.* Chouteau, 25 Mo. 465.

⁷ Same Case, 33 Mo. 201.

which seems an anomaly, since the settled rule is, that while no court takes judicial notice of foreign laws, yet, when proved, they must be proved, as facts indeed, but to the court, for the purpose of construction as to the meaning thereof, the application to the case in hand and their effect thereon being communicated to the jury by instructions.⁸

Whether the laws of other states of the Union are to be considered foreign laws in this regard has been variantly decided. But the weight of authority is probably in the negative, so that, in general, the laws of other states may be judicially noticed.⁹

§ 68. The constitution and by-laws of an association or society are to be construed by the court; and it was held error to instruct the jury to find that proceedings against a member of the Osceola Tribe of Red Men, under charges, were "in accordance with the constitution and by-laws" of the order; the court remarking that whether any, and if any, what proceedings took place, were proper inquiries for the jury; but whether they were in accordance with the constitution and by-laws of the society, or tribe, was a question of law for the court, and not of fact for the jury.¹⁰

§ 69. And so mining laws, when introduced in evidence, are for the construction of the court; and the question whether, by virtue of such laws, a forfeiture

⁸ *Hooper v. Moore*, 5 Jones L. (N. C.) 132; *Ferguson v. Clifford*, 37 N. H. 98. *tra*, *Hooper v. Moore*, 5 Jones L. N. C. 132.

⁹ *Affirming*, *Lockwood v. Crawford*, 13 Conn. 361. *Con-* ¹⁰ *Osceola, &c., v. Rost*, 15 Md. 296.

had accrued is a question of law.¹¹ But it seems that, where there is doubt whether the written mining laws were in force when the cause of action arose, and first parol evidence of the usage is introduced, and afterwards the written mining laws concerning which such doubts existed, the whole may go to the jury together.¹²

§ 70. The question of the reasonableness of a railroad regulation as to third persons, has been held, in New Jersey, to be a matter of fact for the jury, while the validity of a by-law binding the members of the corporation alone, is for the court.¹³ But the weight of authority is the other way. In New York, it is held that the reasonableness of a regulation that way passengers must surrender their tickets before reaching the station next to their destination, without receiving a check or evidence of payment of fare in return, is for the court alone.¹⁴ And the Supreme Court of Illinois, ruling the same way, says, "The necessity of holding this to be a question of law, and therefore within the province of the court to settle, is apparent from the consideration that it is only by so holding that fixed and permanent regulations can be established. If this question is to be left to juries, one rule would be applied by them to-day, and another to-morrow. In one trial a railway would be held liable, and in another presenting the same question, not liable. Neither the companies nor passen-

¹¹ *Fairbanks v. Woodhouse*,
6 Cal. 433.

¹² *Colman v. Clements*, 23
Cal. 248.

¹³ *Morris, &c. R. R. Co. v.*
Ayres, 5 Dutch. 395.

¹⁴ *Vedder v. Fellows*, 20 N.
Y. 129.

gers, would know their rights or their obligations. A fixed system, for the control of the vast interests connected with railways, would be impossible; while such a system is essential equally to the roads and to the public.¹⁵

§ 71. The legality of an ordinance passed by a municipal corporation is for the court. And so, where the city of Peoria, by its charter, had the right to regulate, but not to restrain or prohibit, the sale of fresh meat; and, in pursuance thereof could build market-houses, and confine the trade in meat to these market-houses, it was held error to leave to the jury to determine whether an ordinance did restrain or prohibit the selling or trading in that line of business; the construction of the ordinance, and its effect, being for the court.¹⁶

§ 72. Matters of custom and usage are for the jury; as, for example, the custom of merchants and others, in a usual course of dealing;¹⁷ such as a usual place of receiving goods at Milwaukee, forwarded by steamboat;¹⁸ usage of bankers as to deposits,¹⁹ and as to overdrawing the same;²⁰ the course of usual employment of a vessel;²¹ custom of ship brokers as to renewing charters;²² commercial usage as to commissions;²³ customary management of locomotives;²⁴

¹⁵ Ill. Cen. R. R. v. Whittemore, 43 Ill. 423.

¹⁶ Peoria v. Calhoun, 29 Ill. 320.

¹⁷ Allen v. Lyles, 30 Miss. 516.

¹⁸ Steamboat v. Chapman, 5 Wis. 465.

¹⁹ Chesapeake Bank v. Swain, 29 Md. 496.

²⁰ Cumming v. Shand, 5 Hurl. & Nor. 95.

²¹ Steamboat v. Hopkins, 30 Miss. 703.

²² Allen v. Sundius, 1 Hurl. & Colt. 123.

²³ Kuhlman v. Brown, 4 Rich. (S. C.) 479.

²⁴ Quimby v. R. R., 23 Vt. 394.

agreement as to notice in cases of hiring;²⁵ good husbandry;²⁶ and as to placing curbstones; whether a certain place was a bank;²⁷ and the ordinary use of a horse;²⁸ whether certain outlands had been used as a common by the inhabitants of a village;²⁹ and whether a certain person was a public carrier.³⁰

Whether a custom is reasonable or not is for the court, but the fact of user for the jury.³¹

Where a written instrument is to be explained by usage, parol evidence introduced for the purpose is for the jury, and the province of the court is to instruct them conditionally, or hypothetically, what they should regard as the construction, as they find the evidence to support the purpose for which it is offered, or otherwise. Where an instruction was that a written memorandum was sufficient if the jury should "find that it, either expressly or according to the sense and signification of its language and figures, under the established usage and custom of merchants in the city of Baltimore, at the time, &c., represented truly and fully the terms of, and parties to, the contract of sale," it was held erroneous, as it authorized the jury to construe the memorandum without either an absolute or conditional construction thereof by the court.³²

²⁵ *Parker v. Ebbetson*, 4 C. B. (N. S.) 346.

²⁶ *Wing v. Gray*, 36 Vt. 261.

²⁷ *Way v. Butterworth*, 106 Mass. 76.

²⁸ *Allman v. Gaun*, 29 Ala. 240.

²⁹ *Barry v. Blumenthal*, 32 Mo. 29.

³⁰ *Pennewell v. Cullen*, 5 Harr. (Del.) 241.

³¹ *Bourke v. James*, 4 Mich. 338.

³² *Williams v. Woods*, 16 Md. 252.

§ 73. A common design is held to be a matter of law for the court; but any act done in pursuance of it is for the jury; and whether an assembly is unlawful, is for the court.³³

§ 74. Where a tender, under authority of law, is paid into court, the court will take judicial notice of the fact of payment;³⁴ but it is for the jury to say whether an actual tender between parties has been dispensed with, where one party has rescinded a contract for the other's fraud, and offers to return what he has received, but is prevented by the declaration of the other that he will not accept it.³⁵

CHAPTER V.

INTERPRETATION OF LANGUAGE.

§ 75. THE general rule as to the meaning of words is, that, if they are spoken, they are to be interpreted by the jury; if written, by the court. In spoken words, when the jury have fixed the meaning, the court determines the legal effect and consequence; as, where it was referred to the jury to decide whether spoken words implied a guaranty or a direct undertaking, and the court determined the defendant's lia-

³³ *Com. v. Brown*, 14 Gray, 419; *Frank v. State*, 27 Ala. 88; *Slater v. Wood*, 9 Bosw. 20; *Jones v. Hurlburt*, 39 Barb. 403; *State v. Dula*, Phill. N. C. 214.

³⁴ *Newton v. Allis*, 16 Wis. 198.

³⁵ *Wheelden v. Lowell*, 50 Me. 499.

bility thereon, *held* no error.¹ And in general, words used in conversation are to be construed, as to their meaning and the intention of the parties in using them, by the jury, and the court cannot rule, as matter of law, that spoken words amount to an estoppel *in pais*.²

In an indictment, the court is to decide whether a name is David or Daniel, according to the general rule.³ But in a case where the court could not decide what the figures of a date on a promissory note were, the question of variance was sent to the jury, under instructions; and it was held no error.⁴ But this seems to be anomalous, and a dodging of responsibility.

But, in New Hampshire, it is held that the meaning, force, and construction of language belongs to the court; but whether words were spoken in the speaker's own behalf, or as an agent of another, is to be decided by the jury.⁵

In Maine, it is held that, whether certain words spoken gave authority to sell property, is for the jury,⁶ and this is in accordance with the general rule.

Also, in the same state, where a defendant sold the plaintiff, by written contract, all "his apparatus for making soap, all ashes and soap on hand," &c., "also all his trade and customers," it was held within the general rule, and that the latter clause contained no

¹ Warnick v. Grosholz, 3 Grant's Cases (Pa.) 235.

² Brubaker v. Okeson, 36 Pa. St. 519.

³ Commonwealth v. Riggs, 14 Gray, 377.

⁴ Partridge v. Patterson, 6 Clarke (Iowa) 515.

⁵ Whitney v. Swett, 2 Foster, 14.

⁶ Copeland v. Hall, 29 Me. 94.

latent ambiguity which would require the contract to go to the jury with parol evidence showing the intention of the parties.⁷

§ 76. Particular words and phrases are governed by the general rule above laid down; as, for example, the word "immediately," in a written contract.⁸ But where a purchase of coal was made under written instructions, it was left to the jury to determine whether, according to the instructions, the coal was purchased by the agent "afloat," in the meaning of that term among merchants; and this was held no error.⁹ And what constitutes "unfaithfulness" on the part of commissioners appointed under a complaint for flowage, is held to be for the jury.¹⁰ And where a contract called for "soft English lead," it was held not error to leave the question to the jury whether this phrase meant what was known in commerce as soft lead made in England from whatever ore;¹¹ and, under a written agreement, the question what the words "carding machine and fulling mill," and "fixtures belonging to the fulling mill and carding machine," meant, was held proper for the jury.¹² And so the word "fairly," relating to the manner of working a coal mine under demise, was left to the jury, after the court had expressed an opinion as to its meaning.¹³

⁷ *Warren v. Jones*, 51 Me. 148.

¹¹ *Pallen v. Le Roy*, 30 N. Y.

⁸ *Streeter v. Streeter*, 43 Ill. 563.

165.

¹² *Martin v. Lespe*, 28 N. Y.,

⁹ *Law v. Cross*, 1 Black. U. S. 181.

538.

¹³ *Griffiths v. Rigby*, 27 Eng.

¹⁰ *Berry v. Billings*, 47 Me. Law & Eq. 519.

329.

But whether particular things are "fixtures," or not, is held to be a mixed question of law and fact in Missouri; and held that juries should be guided to an intelligent determination of the question by an explanation of the legal meaning of the term.¹⁴

Evidence of common usage may be brought to explain a written instrument; and then it is for the court to interpret the language of the instrument thereby; as, for instance, to explain the meaning of the word "grain" in a lease.¹⁵

In a railroad subscription, providing that the money should be used in the construction of a road to Derby Line, it was held *prima facie* to mean the north line of Derby. But on trial, the defendant showed that the words "Derby Line," in common usage, meant a village of that name in Derby, and it was thereupon held that it was a question of fact for the jury whether the expression in the contract of subscription meant the north line of Derby or the village named Derby Line.¹⁶

And where a contract was that stones should be delivered "at and near A," it was held a question for the jury whether a point a mile and a half distant was "near" A, in the meaning of the contract; which could not be decided by the court as matter of law.¹⁷ Whether wood is hard or soft wood, is for the jury.¹⁸

¹⁴ Lodge of Masons *v.* Knox, 27 Mo. 315.

¹⁵ Smith *v.* Clayton, 5 Dutch (N. J.) 363.

¹⁶ R. R. *v.* Baxter, 32 Vt. 805.

¹⁷ Shaw *v.* Davis, 7 Mich. 322.

¹⁸ Darling *v.* Dodge, 36 Me. 373.

§ 77. Legal terms may sometimes be explained or defined by the jury. Thus, while what is a "public use" is for the court to determine,¹⁹ yet whether a particular landing is a "public landing" is for the jury.²⁰ And what is a "public place," is a question of law, if the facts are apparent which constitute a public place; but if disputed, it seems the needful parol evidence draws the whole to the jury.²¹

Whether a society is "met together" or dispersed, after the benediction, is held, in Indiana, to be a question for the jury, in a prosecution for disturbing a religious meeting.²²

The question of "dangerous" or "deadly" weapons has been variantly decided, but probably the general doctrine is that it is for the jury.²³

Where the report of commissioners in partition set off to one of the parties "the water privilege now occupied by the saw-mill called Franklin," it was held that the extent of that privilege was for the jury.²⁴ And whether flashboards are a part of a dam is for the jury.²⁵

Under the act of Congress of June 13, 1812, which confirmed the titles to "out-lots" in the town of St. Louis, Mo., on certain conditions, the performance of which conditions and proof of boundaries were required by a later act to be recorded, it was

¹⁹ *R. R. v. Greeley*, 17 N. H. 47.

²⁰ *Burrows v. Gallup*, 32 Conn. 493.

²¹ *Russell v. Dyer*, 40 N. H. 173.

²² *State v. Snyder*, 14 Ind. 429.

²³ For jury, *U. S. v. Small*, 2 Curtis 241; for court, *State v. West*, 2 Jones L. (N. C.) 505.

²⁴ *Munroe v. Gates*, 42 Me. 180.

²⁵ *Noyes v. Silliman*, 24 Conn. 15.

held a question for the jury whether a certain lot and conditions were within the purview of the act of 1812.²⁶

What is an "appurtenance" of a steamboat is held a question for the jury.²⁷

Where a firm, as "Charles G. Ramsey & Co.," give a renewed note, signed "Chas. G. Ramsey and Co.," the question of identity, if raised, is for the jury.²⁸

Where the words "in liquidation" were written under the signature of a note signed by a firm, it is held that if the words are proved to have been written at the time the note was executed, and if, according to mercantile usage, they import a firm dissolved, the jury may infer a notice of dissolution to the payee; and the question when, and by whom, the words were written, and what is the proper inference from them, is exclusively for the jury to decide.²⁹

Whether a business house in another state is "actually engaged in the business of a bank," is for the jury, under the statute of Michigan.³⁰

The materiality of "false and fraudulent" representations is a question of fact.³¹

The question of the "readiness and willingness" of a party to pay is also exclusively for the jury.³²

What is "safe and convenient" in a highway, and

²⁶ *Savignac v. Garrison*, 18 How. 137.

²⁷ *Amis v. Steamboat*, 9 Mo. 629.

²⁸ *Tilford v. Ramsey*, 37 Mo. 567.

²⁹ *Burr v. Williams*, 20 Ark. 172.

³⁰ *Jennings v. The People*, 8 Mich. 81.

³¹ *Bradley v. Poole*, 98 Mass. 169.

³² *Cummings v. Taylor*, 42 Ill. 173.

the obligation connected with it, are questions of fact.³³

In New York, where it is held that juries are not judges of the law, it was held error to charge them that they were to judge of the meaning of the term "prostitution."³⁴ But in Missouri it was held proper to leave to the jury to decide whether a certain game was "a game of chance."³⁵ And in Alabama it was held, that whether a "challenge" to fight a duel had been given, was a question for the jury; and that no particular form of words was necessary to constitute such challenge; and that the jury should decide upon the intention of the party, and whether his words were the mere effusion of passion or folly, the idle boast of a braggart, or an earnest expression of design to fight a duel.³⁶

"Cruel treatment" and "ill-usage" are held questions for the jury, under the instructions of the court.³⁷

Whether, on grounds of public policy, a contract is void, is a question of law, where there is no dispute on the facts from which the question arises.³⁸

And whether communications by a client to an attorney are to be regarded as privileged, is also for the court.³⁹

§ 78. In matters of libel and slander, the general

³³ *Tupp v. Lyman*, 37 Maine, 252; *Bryant v. Biddeford*, 39 Maine, 193.

³⁴ *Carpenter v. People*, 8 Barb. 603.

³⁵ *Glascock v. State*, 10 Mo. 510.

³⁶ *Ivey v. State* 12 Ala. 279.

³⁷ *Ewing v. Ingram*, 4 Gab. N. J. 521; *Byrne v. Byrne*, 3 Tex. 340.

³⁸ *Tallis v. Tallis*, 18 Eng. Law & Eq. 151.

³⁹ *Hull v. Lyon*, 27 Mo. 576.

rule is that it is for the court to define what words are slanderous;⁴⁰ and for the jury to determine upon the speaking and attendant circumstances;⁴¹ and whether the words were spoken of, and concerning the plaintiff.⁴² The signification of particular words averred in an innuendo is a question of fact.⁴³ And words, also, of doubtful meaning, which may be understood in different senses, one of which may be slanderous and the other not, are left to the jury to say in what sense they were meant.⁴⁴ And so, where an angry letter charged the plaintiff with "trying to defraud the defendant for a long time, and with having done as much as lay in his power," the whole was proper for the jury to determine whether the language was intended to bear a sense injurious to the plaintiff; and it was held that the court had no right to assume, on the trial, as it had done, that the letter was no libel.⁴⁵ And so, where a letter was marked "confidential," and contained the words, "had to hold over for a few days for the accommodation of the makers," it was held that the words did not necessarily imply that the makers were unable to pay at maturity; and that it was for the jury to say whether the words were used in an injurious or innocent meaning.⁴⁶ And so, in an action for libel, in calling the plaintiff a "truckmaster," there being no innuendo to explain the mean-

⁴⁰ *Eastham v. Curd*, 15 B. Mon. (Ky.) 105.

⁴¹ *Justice v. Kirlin*, 17 Ind. 590.

⁴² *Green v. Telfair*, 20 Barb. (N. Y.) 13.

⁴³ *Birch v. Benton*, 26 Mo. 160.

⁴⁴ *Lucas v. Nichols*, 7 Jones L. (N. C.) 35.

⁴⁵ *Simmons v. Morse*, 6 Jones L. (N. C.) 7.

⁴⁶ *Lewis v. Chapman*, 16 N. Y. 371.

ing, it was held that, although the dictionary did not contain the word, yet, as it was compounded of two well-known words, the plaintiff had no need to prove its signification, nor the judge to explain it to the jury; but that it was properly left to the jury to decide whether, under the circumstances, it was used in a defamatory sense.⁴⁷

§ 79. Matters of privilege belong to the jury. Where the plaintiff, during the Crimean war, had been a general in command of a corps of irregular troops, and, complaint having been made of the insubordination of those troops, he had resigned on the appointment of a superior officer over him, who directed an officer to inspect the corps, and referred him to the defendant, a civil commissioner, who gave a defamatory statement concerning the behavior of the plaintiff while commanding, or rather when giving up the command, an action of slander was brought. And it was held that the jury could properly inquire into the relevancy of the answer of the defendant, on the application of the inspector for information, in the course of his official duty; and the rule was thus laid down by the court: "When once a confidential relation is established between two persons, with regard to an inquiry of a private nature, whatever takes place between them relevant to the same subject, though at a time and place different from those at which the confidential relation began, may be entitled to protection as well as what passed at the original interview; and it is a question for the jury whether any further

⁴⁷ *Homer v. Taunton*, 5 Hurl. & Nor. 663.

conversation on the same subject, though apparently casual and voluntary, did not take place under the influence of the confidential relation already established between them, and therefore entitled to the same protection.”⁴⁸ And the principle is the same as to relevant or irrelevant testimony as a witness.⁴⁹

§ 80. And, in like manner, circumstances of aggravation are for the jury, as also, per consequence, of mitigation. As, for instance, if a plea of justification is put in maliciously, it is an aggravation; if in good faith, the evidence honestly introduced under it may be taken in mitigation, although insufficient to prove the truth of the plea.⁵⁰

CHAPTER VI.

CONTRACTS.

§ 81. The capacity of parties to contract is a matter of fact. In a Texas case, it was held that a contract cannot be avoided for drunkenness, unless the drunkenness was so excessive as to disable the party from consenting; and that whether such an incapacity existed from this cause in the making of a contract, was for the jury to determine.¹ And the same doctrine is announced in Indiana,² and in Pennsylvania.³

⁴⁸ *Beatson v. Skeene*, 5 Hurl. & Nor. 855.

⁴⁹ *White v. Carroll*, 42 N. Y. 166.

⁵⁰ *Thomas v. Dunaway*, 30 Ill. 387.

¹ *Reynolds v. Dechaums*, 24 Tex. 174.

² *Cummings v. Henry*, 10 Ind. 109.

³ *Hanna v. Phillips*, 1 Grant, 253.

§ 82. As to the existence of a contract, it is held, in New Jersey, that it is for the jury to say, in an action to recover the price of goods sold, whether there was any contract of sale, or not; and if so, what its terms were, and consequently whether there was any stipulation excusing the vendee from obligation to offer to return the goods; and that, when thus determined, the construction and legal effect are for the court.⁴ And so in Missouri.⁵ And where a mother-in-law performs menial service in a family, it is held a question of fact, to be determined from all the circumstances of the case, whether it was under an implied contract for wages or not.⁶ And where parents have been living with a step-son, it is for the jury to determine whether they were to pay board, or were living on the hospitality of their relatives.⁷ But where the law implies a contract for services rendered, there is no question for the jury thereon, as to its existence.⁸ In a *quantum meruit*, however, it is for the jury to affix the amount of value to services rendered, and it is not needful that witnesses express an opinion as to the value thereof in money.⁹

The right to interest for money had and received, is held to be for the court, the jury only having a right to pass on the liability for interest, when the law allows interest to be computed as damages.¹⁰

⁴ Smalley v. Hendrickson, 5 Dutch. 373.

⁵ Judge v. Le Claire, 31 Mo. 127, and Belt v. Goode, *ibid.* 129.

⁶ Smith v. Myers, 19 Mo. 433.

⁷ Myers v. Malcolm, 20 Ill. 622.

⁸ Prickett v. Badger, 37 Eng. Law & Eq. 428.

⁹ Maden v. Porterfield, 7 Jones N. C. 170.

¹⁰ Robinson v. New Ins. Co. 1 Robertson, N. Y. 19.

§ 83. It is the general rule that written contracts are peculiarly for the construction of the court, subject, moreover, to some limitations, which I will notice hereafter. So, where a lease for a stone quarry prescribed that the lessees should pay one and a fourth cent per cubic foot for the stone, and a question arose, under this lease, whether the lessees were liable to pay for rubble stone, which is not sold by the cubic foot, but in mass, or by the perch, the question of liability was held to be for the court.¹¹ And whether, under a contract, payment for the services of the plaintiff were to be paid for annually, or only at their termination.¹² Also, a declaration concerning a deed, importing its trust character, when the declaration was written.¹³ And whether a note calls for \$42.25 or \$42.75;¹⁴ and whether a seller was entitled to keep possession of property under a bill of sale, until an accompanying promissory note was due;¹⁵ and the force and effect of a release.¹⁶

And unless a contract contains technical terms known and understood only by scientific men, the court will construe it without the aid of witnesses to explain it.¹⁷ And words, as "timber," in a contract, is for the court.¹⁸ But if the words are obscure, it is held, in North Carolina, it is to be pronounced void; and if some of

¹¹ *Emery v. Irvings*, 6 Gill (Md.) 199.

¹² *Thomas v. Thomas*, 15 B. Mon. (Ky.) 185.

¹³ *Shepherd v. White*, 11 Tex. 356.

¹⁴ *Drew v. Towle*, 10 Foster N. H. 538.

¹⁵ *Woodman v. Chesley*, 39 Me. 50.

¹⁶ *Lewiston v. R. R.*, 7 Ind. 598.

¹⁷ *McAvoy v. Long*, 13 Ill. 150.

¹⁸ *Nash v. Drisco*, 51 Me. 417.

the terms are words of art and science, the jury must find the meaning on the testimony of experts; and afterwards the contract is to be construed by the court.¹⁹ I think, however, that the general rule is, that such testimony preliminary to construction is for the court usually.

§ 84. Whether a contract is contrary to public policy, is for the court,²⁰ although it is held, in Iowa, to be a question of fact for the jury, whether the consideration in a written agreement makes it distinctly a wager contract.²¹

§ 85. We notice now the limitations and restrictions declared upon the exclusive power of the court to construe written contracts. Where a letter, in regard to which there is contradictory evidence, would alter a contract as it appears in other letters, the contents of that letter are for the jury,²² although it is in general for the court to determine whether letters passing between parties constitute a contract,²³ and even to construe contracts in the light of extrinsic facts found by a jury.²⁴ Where a parol contract is first agreed upon, and afterwards a written contract is made, it is for the jury to say whether the latter contains all the terms of the former.²⁵ And whether an agreement to collect money includes all of certain

¹⁹ *Silverthorne v. Fowle*, 4 Jones, 363.

²⁰ *Pierce v. Randolph*, 12 Tex. 295.

²¹ *Craig v. Andrews*, 7 Clarke, 21.

²² *Sellars v. Johnson*, 65 N. C. 105.

²³ *Smith v. Faulkner*, 12 Gray, 251, and *Lockhart v. Ogden*, 30 Cal. 556.

²⁴ *Curtis v. Martz*, 14 Mich. 513.

²⁵ *Cobb v. Wallace*, 5 Cald. (Tenn.) 543.

notes.²⁶ Where the meaning depends on extrinsic facts, which are doubted or disputed, the matter goes to the jury, although not if the facts are certain; according to the decisions in Pennsylvania.²⁷ And where there is a dispute as to whether a certain contract is in writing or not, the jury determines it on evidence.²⁸ And where the dispute relates to the terms, the intent of the parties is for the jury.²⁹ And it has been decided by the Supreme Court of the United States, that where a vessel was chartered to bring a cargo of guano from the Cincha Islands to the United States, at the rate of \$25 per ton freight, with a stipulation that the ship should be entitled to any advance in the guano freight made by the charterers, and afterwards they chartered vessels to go from the United States for guano (reserving to the charterers certain privileges), at the rate of \$30 per ton freight, it was held a question for the jury whether the real contract in the last charters was to bring home guano at the rate of \$30 dollars per ton freight; because contingent agreements between merchants and ship-owners must be gathered from the language employed, interpreted in the light of surrounding circumstances, and of the subject matter. And the rule is stated to be that "where the effect of a written agreement, collaterally introduced as evidence, depends not merely on the construction and meaning of

²⁶ Broward *v.* Daggett, 2 Fla. 554; *R. R. Co. v. Cassell*, 17 Ill. 49. 394.

²⁷ Edelman *v.* Yeakel, 27 Pa. ²⁹ Chapin *v.* Patten, 1 Hilton N. Y. 373.

St. 30.
²⁸ Jenness *v.* Berry, 17 N. H.

the instrument, but upon extrinsic facts and circumstances, the inferences of fact to be drawn from it must be left to the jury.”³⁰

In Pennsylvania, it is held in general, that the mere fact of a contract being in writing does not entitle the court to interpret its meaning conclusively; that although, where it is unaffected by parol proof, it is within the province of the court to interpret it; yet, where the question is not on the interpretation of the writing, but on its effect as a collateral fact, it belongs to the jury.³¹ And where the evidence of a contract leaves it obscure, by reason of its consisting in part of a memorandum in writing made by defendant subsequent to the contract, and also in part of certain parol proof, the whole was held to be properly submitted to the jury to determine what the contract was.³² And so, where an instrument, directed to a third person, was thus expressed, “There is a balance due the bearer \$475,” it was held that it was to be regarded merely as a memorandum of the fact, or as conveying information thereof; having no legal significance until explained, and was not of itself a contract for the payment of money; and it was for the jury to say what the fact was of which the instrument was a memorandum.³³

Controverted facts, on specific performance, go to the jury, in Pennsylvania; and it is held to be a ques-

³⁰ *Barreda v. Silsbee*, 21 How. 147.

³¹ *Reynolds v. Richards*, 14 Pa. St. 208.

³² *Edwards v. Goldsmith*, 16 Pa. St. 47.

³³ *Hopson v. Bumwankel*, 24 Tex. 609.

tion for them whether there was fraud in its making, or an offer to perform.³⁴

When, upon trial of a cause, the evidence leaves it doubtful whether a written contract for the sale of goods, signed by the vendor, and delivered to the purchaser, was delivered absolutely or conditionally, it is for the jury to determine the point.³⁵

§ 86. In regard to parol contracts, the weight of authority is, I think, that the construction goes to the jury; although the legal effect of the terms thereof is for the court. What language was used, and how it was understood by the parties, are matters for the jury.³⁶ So, whether a parol agreement was for a cotton-gin, manufactured or to be manufactured;³⁷ or was an agreement to pay the debt of another.³⁸ And in an action of assumpsit, wherein was alleged a parol promise to pay a certain amount for the conveyance to the defendant of a portion of real estate, and wherein the court instructed the jury that, if they believed the evidence, the plaintiff was entitled to recover, the instruction was held to be error, since it belonged to the jury to determine the promise, if any, in its full purport.³⁹ And whether a contract for carrying goods is one of affreightment as a common carrier or a hiring by the job, specially, is for the jury.⁴⁰ And whether the making of a contract on

³⁴ *Williams v. Bentley*, 29 Pa. St. 276.

³⁵ *Scott v. Pentz*, 5 Sand. (N. Y.) 576.

³⁶ *Folsom v. Plumer*, 43 N. H. 471, and *Herbert v. Ford*, 33 Me. 93.

³⁷ *Winship v. Buzzard*, 9 Rich. S. C. 105.

³⁸ *Kun's Ex. v. Young*, 34 Pa. St. 62.

³⁹ *Tobin v. Gregg*, 34 Pa. St. 449.

⁴⁰ *Fuller v. Bradley*, 25 Pa. St. 120.

Sunday was justifiable, in order to determine as to its validity or invalidity, is a question of fact, in Alabama.⁴¹

Whether facts proved are evidence of a new agreement rescinding a former one, is for the jury to determine.⁴² And it is also the province of a jury to determine whether a written contract is established by the proof.⁴³ And so, where the evidence is conflicting as to the rights of the parties, under a parol contract, the whole is a question of fact.⁴⁴

The question of performance of a contract is, of course, for the jury.⁴⁵ And so, where a parol contract was to deliver a certain number of barrels of oil, but of no specified capacity, it was held a question of fact whether the contract was fulfilled by the delivery of a less number of vessels of a greater capacity than the statute barrel, when no instruction was asked, that, in the absence of a standard of measurement fixed by the parties, the statute standard should govern.⁴⁶ And so, as to the meaning of the phrase in a building contract, "when the walls shall be completed," the meaning is for the court; and the jury are to determine whether the necessary acts have been done.⁴⁷

In accordance with the general rule, it is for the

⁴¹ *Hooper v. Edwards*, 18 Ala. 283.

⁴² *Martin v. Angell*, 8 Barb. (N. Y.) 407.

⁴³ *Stake v. Burrell*, 3 Grant (Pa.) 241.

⁴⁴ *Kingsbury v. Buchanan*, 11 Iowa, 398.

⁴⁵ *Dodge v. Rogers*, 9 Minn. 224.

⁴⁶ *Cullum v. Wagstaff*, 48 Pa. St. 304.

⁴⁷ *Worcester Med. Ins. v. Harding*, 11 Cush. (Mass.) 285.

court to inform the jury whether a certain paper introduced in evidence is, or is not, a contract fixing the liability of the parties.⁴⁸

And also the proper form of action to be brought; as, for example, whether trover for conversion of property, or assumpsit for the value thereof, is for the court.⁴⁹ And, likewise, whether a person is entitled to damages for the loss of a contract, recited in one on which suit is brought.⁵⁰

§ 87. As to the fulfilment of conditions, it is held, in California, that where a draft is accepted conditionally, to be paid upon the happening of a contingency, whether the contingency has happened is for the jury.⁵¹ And, in New York, that, where a deed was upon an express condition that the grantee should support and maintain the grantors; and that if he failed to do so the land conveyed should revert, it was proper for a judge to leave it to the jury, whether the grantee intended in good faith to perform, and had, in fact, substantially performed, the condition imposed by the deed.⁵² But, in Missouri, where land was conveyed, and notes given for the purchase money, and, subsequently, on doubts of the grantor's title, it was agreed that, unless within a reasonable time he should make a good title, the notes should be void, and he should receive the land back, and afterwards suit was brought on the promissory notes,

⁴⁸ *Eiser v. Weissgerber*, 2 Clarke (Iowa) 479.

⁴⁹ *Estes v. Boothe*, 20 Ark. 590.

⁵⁰ *Bridges v. Stickney*, 38 Maine, 371.

⁵¹ *Nagle v. Horner*, 8 Cal. 358.

⁵² *Spaulding v. Hallenbeck*, 39 Barb. 84.

it was held that it belonged to the court to determine whether the grantor had made good the title according to the agreement.⁵³ This decision was based on the doctrine that the nature of a title is a question of law.

§ 88. An abandonment is held, in North Carolina, to be for the court,⁵⁴ although this would seem to be quite a deviation from the general principle that performance is for the jury. And also whether the conduct complained of by an employer against an overseer, was a sufficient ground for discharging him.⁵⁵ On the other hand, it has been decided by the Circuit Court of the United States for New York, Connecticut, and Vermont, that the question of a deviation in a voyage cannot be decided as matter of law, nor, therefore, judicially noticed by the court.⁵⁶ In Maryland, it is held that what constitutes good cause for breaking up a contract is for the decision of the court.⁵⁷

§ 89. Whether a joint liability existed among several railroad companies, which had entered into an agreement to carry cotton through from Chattanooga to Charleston at sixty-five cents per hundred pounds, and against one of which suit was brought by shippers for damage to cotton before it reached the road of the defendants, was held to be properly left to the jury; because the arrangement was in part dependent upon parol evidence.⁵⁸

⁵³ *West v. Best*, 28 Mo. 554.

⁵⁴ *Duler v. Cowles*, 7 Jones L. 293.

⁵⁵ *Hendrickson v. Anderson*, 5 Jones L. 248.

⁵⁶ *Brig, &c., v. Matthews*, 2 Paine C. C. 229.

⁵⁷ *Burroughs v. Langley*, 10 Md. 249.

⁵⁸ *Bradford v. R. R. Co.* 7 Rich. (S. C.) 214.

§ 90. A new promise with reference to the statute of limitations follows, in general, the established rule as to written and parol contracts; the former being for the court, the latter for the jury. So, where the evidence shows an express promise, it is a question of law,⁵⁹ notwithstanding it was a verbal promise. And a written acknowledgment is held to be for the court.⁶⁰ And where the acknowledgment arose from an undisputed payment indorsed on a note.⁶¹

On the other hand, it is held that an implied promise is for the jury;⁶² although it was held, in an early case in the same state, that it is not for the jury to determine what acts or declarations amount to a new promise.⁶³ And proof of the defendant saying that the debt was just, though at the same time he said he did not think the creditor intended he should pay it, was left to the jury, to determine therefrom whether there was a new promise in the case.⁶⁴

Also, it belongs to the jury to determine whether the promise referred to the debt in suit,⁶⁵ and that, too, where the promise was contained in a letter;⁶⁶ and this is an inference from all the circumstances.⁶⁷ And, also, it is a question of fact whether the declarations were with regard to an individual liability, or to the liability of government, where suit was brought

⁵⁹ *Evans v. Carey*, 29 Ala. 99.

⁶⁴ *Buswell v. Roby*, 3 N. H.

⁶⁰ *Beasley v. Evans*, 35 Miss. 467.

196.

⁶⁵ *Cook v. Martin*, 29 Conn. 66.

⁶¹ *Miller v. Talcott*, 46 Barb.

⁶⁶ *Dickinson v. Lott*, 29 Tex.

172.

178.

⁶² *White v. Jordan*, 27 Me. 379.

⁶⁷ *Kimball v. Estate of Baxter*, 1 Wms. (Vt.) 632.

⁶³ *Miller v. Lancaster*, 4

Greenl. (Me.) 159.

against the collector of the port of New York, to recover back an excess of duties paid to him.⁶⁸

A new promise after a discharge in bankruptcy is governed by the same rules.⁶⁹

§ 91. In matters of warranty, where it rests on oral proof, it is a question for the jury; and the question of unsoundness is so likewise;⁷⁰ and the fitness of goods for the purpose intended;⁷¹ and whether words concerning the age of horses, in the act of sale, imply a warranty;⁷² and whether, on the sale of a cow, the words "She is all right" are a warranty of her soundness.⁷³ They are to decide on an oral warranty, under instructions, what the terms of the contract are, and the existence of the ingredients necessary to constitute a warranty.⁷⁴

In determining these, it is needful to ascertain the intent and understanding of the parties, since a simple affirmation is not necessarily a warranty.⁷⁵ Whether, therefore, it is a mere expression of opinion, or of a purpose to warrant, is a matter of fact for the jury.⁷⁶ It is also the province of the jury, on a warranty of soundness, to decide what is embraced therein. And on that question the qualities and uses for which the animal was sold and purchased, may be referred to,

⁶⁸ *Dorr v. Swartwout*, 1 Blatch. C. C. 184.

⁶⁹ *Bennett v. Everett*, 3 R. I. 152; *United Soc. v. Winkley*, 7 Gray, 460.

⁷⁰ *Lindsey v. Davis*, 30 Mo. 412.

⁷¹ *Prentice v. Dike*, 6 Duer (N. Y.) 224.

⁷² *Rogers v. Ackerman*, 22 Barb. 135.

⁷³ *Tuttle v. Brown*, 4 Gray, 460.

⁷⁴ *Congar v. Chamberlain*, 14 Wis. 258.

⁷⁵ *Bond v. Clark*, 35 Vt. 581.

⁷⁶ *Laume v. Gregg*, 1 Met. (Ky.) 444.

as explaining what was intended to be included in the warranty.⁷⁷

§ 92. While it is a question of law what constitutes a contract establishing a partnership, it is a question of fact whether, in any particular case, a partnership exists, or not;⁷⁸ and so, where the instruction was, "Whether liable to the extent of the claim as partner, or otherwise, is a question of greater difficulty; but the court inclines to the opinion that he is, and so instructs the jury," it was held error; and the court observes: "Whether a partnership existed or not, at the time when the services sued for in this action were rendered, was a question for the jury to determine, upon the facts of the case, under the instructions of the court, if instructions were asked as to what in law constituted a partnership; but here the fact of partnership is assumed by the court, and the jury specially instructed that the defendant is liable."⁷⁹ And a partnership may be proved by the acts and dealings, conduct, admissions, and declarations, as between themselves and towards others.⁸⁰ And whether a clerk, whose deposition has been taken in a cause, was a secret partner or not, was held to be properly submitted to the jury.⁸¹

§ 93. And partnership property is also a question of fact; as where two partners signed a petition in insolvency, and while this was pending, one of them

⁷⁷ *Thornton v. Thompson*, 4 Gratt. (Va.) 121.

⁷⁸ *McMullan v. McKenzie*, 2 Greene (Iowa) 369.

⁷⁹ *Daggett v. Jordan*, 2 Fla. 549.

⁸⁰ *Robinson v. Greene's Administrator*, 5 Harr. (Del.) 117.

⁸¹ *Hunter v. Hubbard*, 26 Tex. 545.

was killed by the cars before the presentation of the petition to the court of insolvency, and the judge, not knowing the death, issued a warrant in the usual form; the usual publication being made, at which time the death was known; a considerable sum of money was found on the person of the deceased, and a dispute arose whether this was private money or partnership assets, it was held, in an action against the coroner by the administrator, that the question was for the jury; it appearing that a portion of the money was received by him in payment of a debt due the firm, and mingled with his own money.⁸² And also, where a partner borrows money, the question whether it was on his own credit or that of the firm, is a question of fact, and the admission of the borrowing partner may be considered in order to bind the firm.⁸³

§ 94. As to a partnership liability, for money or stock used in the course of business, the determination is with the jury; as where one borrowed gold dust from another in order to form a partnership, in which the gold dust was used as stock; and afterwards the question arose as to the liability of the firm to the lender, and the point of fact was submitted to the jury whether the gold dust was put in as capital by the borrower in entering the partnership, or was taken and used by the firm on their joint credit, the submission was held proper.⁸⁴

⁸² *Durgin v. Coolidge*, 3 Allen (Mass.) 555.

⁸⁴ *Donally v. Ryan*, 41 Pa. St. 308.

⁸³ *Webster v. Stearns*, 44 N. H. 502

The terms of a contract for the adjustment of differences between copartners, in the settlement of their firm business, should be ascertained by a jury; as, where one is to take the assets on dissolution, and pay the debts, whether it was meant, or intended, between the parties, that a debtor should pay that one member a debt owing to the firm, and this be accounted as part of the assets.⁸⁵

§ 95. In contracts of bailment, where one whose principal occupation is farming, but occasionally, and at certain seasons, is accustomed to carry goods for any who may employ him, for hire, whether he ought to be held to the responsibility of a public carrier, or only to that of a private carrier, in a case where a wagon load of goods was burned, is for the jury to determine.⁸⁶ And whether a bailment is gratuitous or for hire, is also a question of fact.⁸⁷

Also, the character of goods, when the point is as to the kind usually carried for hire; as, where the proof was, that, although it was the uniform custom of steamboats to carry cash letters, yet no charge was made for such service unless a receipt was demanded by the sender, when a percentage price was taken by the boat officers, it was held to be for the jury to determine whether a particular lost money package belonged to the kind of packages which the boat undertook to carry for hire.⁸⁸

§ 96. The matter of comparative risk has been de-

⁸⁵ *Carl v. Knott*, 16 Iowa, 384.

⁸⁷ *Dimmick v. R. R.* 18 Wis.

⁸⁶ *Haynie v. Baylor*, 18 Tex. 474.

507.

⁸⁸ *Knox v. Rives*, 14 Ala. 257.

cided to be a question of fact. Thus, in an action by a carrier against a railroad company for not carrying a package to Leeds in reasonable time, and for not delivering it, it appeared that the plaintiff was a collector of small parcels in London to be forwarded, and also a carrier for one certain individual. The first — general collection — were made into a single parcel called a "packed parcel;" the second — individual collection — were called "enclosures." The company charged a higher rate for the former than the latter. And the jury were held the proper judges of the fact whether there was a difference of risk between carrying the "packed parcels" and the "enclosures."⁸⁹

Where, by mistake, a clause in a bill of lading, limiting the responsibility of the carrier, was inserted, or left in, the question of mistake was held to be for the consideration of the jury.⁹⁰

In the matter of liability on the part of innkeepers, where the statute provides that there shall be no liability for money, valuables, &c., not deposited with the innkeeper for safe-keeping, on notice to the guest; and a guest had had stolen from his room, his watch with chain attached, a gold pen, and pencil-case, and twenty-five dollars in money, it was held that the statute did not include small sums of money kept about the person of the guest for ready money in reasonable expenses, and that it is for the jury to say what "reasonable expenses" may include.⁹¹ And

⁸⁹ *Crouch v. R. R. Co.* 34 Eng. L. & Eq. 577.

⁹⁰ *Chouteaux v. Leech*, 18 Pa. St. 232.

⁹¹ *Gile v. Libby*, 36 Barb. (N. Y.) 76. See also *Maltby v. Chapman*, 25 Md. 316, and *Merrill v. Grinnell*, 30 N. Y. 597.

what articles constitute "baggage" is a question of fact,⁹² to be determined by usage of travellers generally, as to what they carry in their trunks.⁹³

CHAPTER VII.

INTENTION, KNOWLEDGE, AND NOTICE.

§ 97. THE question of intention sometimes comes to the court, but usually to the jury. Thus, in the case of the delivery of a deed, if the circumstances are not disputed, it is a question of law; but if there is conflicting evidence, the needful parol proof draws it to the consideration of the jury.¹ Where, however, a subscribing witness to a deed testified that, immediately after the execution of the deed, the grantor handed it to the mother of the infant grantees, with the words "Keep it," it was held that, whether it was the grantor's intention to make this a delivery, was to be determined by the jury, under the instructions of the court.²

§ 98. When the intention of one who executes a writing is to be judged of by the writing *per se*, it is a question of law; but when a writing is to be judged of by extrinsic facts, and is part of a transaction of which the rest consists of words, or acts, the whole

⁹² Whittaker v. Clark, 37 Ga. 249.

⁹³ Grant v. Newton, 1 E. D. Smith (N. Y.) 96.

¹ Carnes v. Platt, How. Prac. R. (N. Y.) 102.

² Gregory v. Walker, 38 Ala. 33.

evidence should go to the jury together.³ This is the general rule. Under it, it has been held that whether a note was signed by a person as trustee, or as an individual payor, is to be decided by the court, in view of the language of the note, the circumstances under which it was executed, and the situation of the parties.⁴ But whether a deed absolute on its face was executed under such circumstances, and arrangement between the plaintiff and his brother, as to render it a mortgage instead of a deed, was held a question of fact.⁵ And so the good faith of a chattel mortgage is held a question of fact.⁶ And where a sale of land was made for four hundred dollars, and afterwards a bond executed by the vendee to the vendor, promising to reconvey the land to the vendor within two years for eight hundred dollars, it was held that the jury might ascertain, from all the transactions between the parties, whether the deed was in the nature of a mortgage to secure the loan of four hundred dollars to be repaid with eight hundred dollars in two years, and whether the agreement was usurious or not.⁷ And parol evidence is admissible to show the intention of the execution of the instrument.⁸

§ 99. With what intent or motive the purchaser of a railroad bond acted, where the bond bore upon its face a certificate signed by persons describing themselves as trustees, and declaring that the bonds are

³ *Winter v. Norton*, 1 Oreg. 45.

⁷ *Bishop v. Williams*, 18 Ill. 104.

⁴ *Lewis v. Harris*, 4 Met. 355.

⁸ *McCarron v. Cassidy*, 18 Ark. 49; *Parish v. Gates*, 29 Ala. 254.

⁵ *Bemis v. Phelps*, 41 Vt. 4.

⁶ *Miller v. Lockwood*, 32 N. Y. 298.

secured by a first mortgage to them, in trust for the bondholders, is a matter of fact. The court, in ruling thus, said, "The certificate subjoined to the bond constitutes no part of the instrument, and consequently the representation contained in it does not, in any respect, control or modify the obligation of the bond, nor in any manner vary or affect the rights or responsibilities of the parties to it. It is simply an affirmation that the estate mortgaged as security for the ultimate payment of their dues to the bondholders, is subject to no prior similar incumbrance. Under certain circumstances, such a representation might have an important, even a controlling, influence in forming a judgment concerning the real or marketable value of the bonds; for a knowledge of the fact stated is essential to anything like an accurate estimate of the value of the security, and consequently it may be of the bonds secured also. The affirmation of the certificate appended to the bond sold to the defendant, must therefore be considered to have been made in relation to a material fact, which would have been not unlikely, in itself, to produce an influence upon his judgment, and an effect upon this action. But not necessarily so. This is to be determined, not alone upon the representation itself, but upon all the circumstances attending the transaction; and it is in view of all these that the question, whether there was in fact a warranty, must be determined; and this must be submitted to and decided by a jury. To the existence of that contract, it is essential that the defendant should have received and relied upon the affirmation in assenting to, or in consummating, the contract con-

cerning the sale and purchase of the bond between himself and the railroad company. If he did not receive nor rely upon it at all, and was not influenced by it, and did not act upon the faith of it, in making the bargain, there was no warranty by the vendors, and their affirmation could not have constituted any part of the consideration for his note to them; and therefore he had no defence to set up against it. The instruction of the presiding judge brought this question, directly and distinctly, to the consideration of the jury; for they were advised that the defendant could not legally claim any deduction for his note on account of any damages sustained by him, unless they were satisfied, upon the whole evidence, that he was induced to pay his money and give his note, wholly or in part, by a reliance on the truth of the representation made in the certificate.”⁹

And thus, also, as to an inducement to buy, it is held, that where one bought a chattel from one who was not the owner of it, and it was found by the jury as a fact that he was induced to buy by the acts or declarations of the real owner, the latter is estopped from again claiming it.¹⁰

§ 100. An intention to deceive is a question of fact also. Thus, in an action for deceit, where the defendant was alleged to have represented falsely that a third person was worthy of credit, it was so held; and the court, in argument, said, “In the points propounded by the plaintiffs, the court was requested to

⁹ *Edwards v. Marcy*, 2 Allen (Mass.) 491.

¹⁰ *Mason v. Williams*, 8 Jones (N. C.) 480.

instruct the jury respecting the liability arising out of false representations and fraudulent concealment. Now, if the representations were false, and yet were honestly believed to be true, and if the existence of the judgment-bond was not mentioned through thoughtlessness, and without intention to deceive, the liability of the defendants for damages was not made out. Guilty knowledge, and an intent to deceive, were essential to the plaintiff's recovery, and they were charged in the declaration. To warrant a verdict for the plaintiffs, they must have been found by the jury. And it was not for the court to withdraw the question from the jury, as they would have done had they affirmed the plaintiff's second point, without more."¹¹

And where a person purchased cabinet furniture on credit, having previously confessed a judgment for a large amount in favor of other parties, and very soon after the purchase executing a chattel mortgage on his entire stock in trade, including the furniture purchased from the plaintiffs, to secure the payment of \$3500 due the defendant, and the sheriff, within a month or two after the sale, having several executions against the purchaser, which he had to return unsatisfied, an action was brought by the vendors of the purchase against the mortgagee to avoid the sale, and recover the property, and it was held, 1. That mere insolvency could not avoid the sale; and though the purchaser knew himself to be insolvent, yet, as he had made no false representation as to his standing, if he

¹¹ *Graham v. Hollinger*, 46 Pa. St. 57.

purchased the furniture with the honest intention of continuing his business, and paying for the same if he could, the sale was not avoidable on the ground of fraud. If, however, the purchase was made with a knowledge of his insolvency, and yet with an intention of subjecting the furniture to the judgment previously confessed, or to the subsequent mortgage, the fraud would vitiate the sale; and 2. That the question presented in the action to recover the property under mortgage, was one of motive, namely, whether the purchaser acted with an honest or fraudulent design; and that it was error to withhold this from the jury.¹²

It is held, also, that it is not enough to avoid a sale of goods, that the purchaser did not intend to pay for them at the agreed time. To prevent the title from passing, he must intend never to pay for them; and this is a question of fact.¹³ And on this, the Supreme Court of Missouri observes, "There is a very broad line of distinction, both in morals and law, between the conduct of one who gets property into his possession, with a preconceived design never to pay for it, under color of a formal sale induced by a sham promise to pay, which the party never intends to comply with, and the conduct of a man deeply involved in debt, far, perhaps, beyond his means of payment, and who, struggling, it may be, and frequently is, against all rational hope, to sustain his credit and maintain his position in business, buys property to-day under a promise to pay for it on short time, in order to raise money, from day to day, to meet immediate and more

¹² Buckley v. Archer, 21 Barb. 585.

¹³ Bidault v. Wales, 30 Mo. 550.

pressing demands. Yet, under the instruction, the jury may well have supposed, and no doubt did suppose, that the law made no distinction, but visited both classes of cases with the same legal consequences. The difference between not intending to pay on the day fixed by the contract, and intending never to pay; between getting property for nothing, under the mere color of a purchase, and getting it upon a longer credit than was agreed upon by the parties, but with an expectation ultimately to pay, is entirely lost sight of; or rather, indeed, as it seems to us, the jury are, in effect, instructed that there is no difference, and that it is enough, in this particular, to avoid the sale as a fraudulent purchase, that the purchaser was unable to pay at the time agreed upon, and aware of his inability in this respect, and did not intend to meet his engagements in point of time. It was said before, and is repeated now, that this is a question for a jury, under proper instructions from the court."

And a fraudulent intent, accordingly, in the sale or disposition of property, is a question of fact.¹⁴

§ 101. And, likewise, in general, the question of abandonment; this being a matter of intention largely, as, for example, of a homestead by change of domicil.¹⁵ But sometimes the abandonment of possession of land is for the court, where it is merely inferable from lapse of time, and the rule is thus laid down in *Brentlinger v. Hutchinson*, 1 Watts, 46, and quoted in a subsequent case, referred to in the foot

¹⁴ *Maple v. Burnside*, 22 Ind. 139, and *Miller v. Stewart*. 24 Cal. 502.

¹⁵ *Locke v. Rowell*, 47 N. H.

49.

references below: "Where there is no dispute as to the length of time, it is a question of law to be decided by the court without regard to the intention of the party. When the question of abandonment is made upon a lapse of time less than seven years, accompanied by circumstances from which it might be inferred that the party intended to abandon, it is a mixed question of fact and law to be submitted to the decision of the jury."¹⁶ The rule, however, does not seem to have been very closely followed in Pennsylvania.

And in Vermont, it is held that, in a case of prior possession, a lapse of fifteen years or more between different acts of possession was not conclusive evidence of abandonment; and the court say, "We apprehend it must always be a question of fact, whether a prior possession has been abandoned or not. Lapse of time, whether it be somewhat less or more than fifteen years, might go to the jury, as furnishing some evidence to prove an abandonment, but the weight of it would be to be judged of by the jury under the circumstances of each particular case; and if, on the whole, a presumption is to be drawn of an abandonment, it is a presumption of fact and not of law."¹⁷ And abandonment under Spanish law is likewise for the jury,¹⁸ and therein, it is to be decided upon all the circumstances. And the abandonment of a right to an easement.¹⁹ And of an assignment for the benefit of creditors.²⁰

¹⁶ *Whitcomb v. Hoyt*, 30 Pa. St. 410.

¹⁷ *Patchin v. Stroud*, 38 Vt. 395.

¹⁸ *Fine v. St. Louis Public Schools*, 30 Mo. 175.

¹⁹ *Parkins v. Dunham*, 3 Strobb. (S. C.) 226.

²⁰ *Wilson v. Pearson*, 20 Ill. 87.

§ 102. It is a question of fact, where a will was imperfectly executed, as to the intention of the testator, that the will should not dispose of personal property therein mentioned, unless it could also take effect as to the realty.²¹

As to the revocation of a will, it is for the court; but the acts, conduct, and declarations of the maker are circumstances to be found by the jury; as where a maker burned a paper by mistake, supposing it to be her will, and died in the belief that the will was thus destroyed.²²

§ 103. A question of ratification by a principal, is for the court; unless the evidence is uncertain, when it should go to the jury.²³

§ 104. An intention of adverse possession is for the jury.²⁴ And whether the acts of a devisee show an intention of taking possession under a will.²⁵ And the ouster of a co-tenant.²⁶

§ 105. Intention of purchasing or selling. Thus, where an absolute deed, with other instruments operating as a defeasance, be simultaneously executed, these all together form a mortgage; and it is for the court to pronounce on their legal effect. But where the alleged defeasance is executed subsequently, it is a question of fact, whether the transaction was designed as a security for money, or as a sale.²⁷ And where

²¹ *Fatheree v. Lawrence*, 33 Miss. 628.

²² *Smiley v. Gambill*, 2 Head (Tenn.) 165.

²³ *Commercial Bank v. Jones*, 18 Tex. 816.

²⁴ *Magee v. Magee*, 37 Miss. 149.

²⁵ *Landis v. Landis*, 1 Grant (Pa.) 249.

²⁶ *Moore v. Callishaw*, 10 Pa. St. 230.

²⁷ *Wilson v. Executor*, 31 Pa. St. 298.

redemption-money is received after the statutory period of redemption of land sold for taxes has passed, whether it is a redemption or a sale, according to the intention of the parties, is a question of fact.²⁸ And where a third person pays the amount of a note, and takes possession of it, whether he intended to purchase it, or pay it for the mere accommodation of the maker, is for the jury.²⁹ And where evidence left it doubtful whether a transaction amounted to a purchase, or a discount of a note, it was held that the judge should not have decided the question as matter of law, but left it to the determination of the jury.³⁰ And, also, whether the parties intended a sale to take immediate effect, and the price to be fixed or payment made at a future time, is matter of fact.³¹

§ 106. The terms of the delivery of a contract, where it is left in duplicate by the parties with a third person, and the evidence as to the subsequent delivery and operation thereof is conflicting, are a matter of fact, depending upon the intention of the parties, to be gathered from the whole transaction; and it was held that, in such case, the court was right in refusing to instruct that delivery in a particular mode was necessary; and, in some measure, the matter rested on the nature and provisions of the contract itself, which was also thereby subjected to interpretation by the jury.³²

²⁸ *Cree v. Walcott*, 27 Pa. St. 159. *v. Executors, Hill & Denio*, N. Y. 254.

²⁹ *Rumfan v. Clark*, 4 Jones L., N. C. 53. ³¹ *Fuller v. Bean*, 34 N. H. 299.

³⁰ *American Life Ins., &c., Co.* ³² *Jaquith v. Hudson*, 5 Mich.

§ 107. The delivery of a part of property sold, where there is a receipt acknowledging payment, is a question of intention, as to whether the part delivery was to be a transfer of the title to the whole, and is to go to the jury.³³

§ 108. Where premises are rented, and there is a reservation in the lease of the right to sell at any time, for a particular purpose, any part of the land, and where, by virtue of such reservation, a portion is sold, and the question arises whether it was in good faith for the purpose specified in the lease, it is a matter of fact.³⁴

§ 109. Where a statute authorizes interest, in addition to damages, as to money which has been vexatiously withheld, it is a question of fact, whether, on an action for breach of contract, such interest shall be allowed, and the court will not interfere with the verdict unless it is clearly manifest that the jury have abused their discretion herein.³⁵

§ 110. A formal settlement of accounts *prima facie* includes all accounts. But where a question arises in any case, as to whether a particular item was, or was not, embraced in a settlement, it is proper for the jury to decide what was settled.³⁶ Also, where there are two claims, — one barred by limitation, the other not, — and a sum of money is paid without a specific appropriation by the debtor, it is a question of fact whether the payment was made generally, on account

³³ Pratt v. Chase, 40 Me. 273.

³⁵ Rogers v. West, 9 Ind. 401.

³⁴ Muzzy v. Den, 1 Dutch. N. J. 472.

³⁶ Rourke v. James, 4 Gibbs (Mich.) 338.

of whatever debts existed, or on one or the other particular accounts.³⁷

§ 111. As to which tract of unseated lands (there being no government survey to guide), an assessment of taxes was laid upon, this goes, it seems, to the jury, notwithstanding it is, at least in part, determinable from records.³⁸

§ 112. In England, it is held that to evict a tenant it is not necessary that there should be an actual expulsion from any portion of the land, but any act of the landlord, or of another as the agent of the landlord, or by his procurement, with the intention of permanently depriving the tenant of the enjoyment of the premises as demised, or any part thereof, will operate as an eviction, and the question of such intention is a matter of fact.³⁹

§ 113. As to whether, under certain circumstances, money was lent to a tenant, or advanced to the landlord, it is held in England to be a question for the jury. The circumstances were that a tenant was in arrears, and the landlord's agent, without his authority or knowledge, took a bill of exchange from the tenant for the amount of the rent, and then paid over the amount of the rent to the landlord in his settlement of account. Afterwards the bill was dishonored in the hands of a third party, and so the rent was not paid by the tenant; whereupon the landlord distrained; and it was held to be for the jury to

³⁷ Walker v. Butler, 37 Eng. L. & E. 14.

³⁹ Upton v. Townsend, 33 Eng. L. & E. 212.

³⁸ Russel v. Wentz, 24 Pa. St. 345.

decide whether the bill was discounted for, or the money lent by, the agent to the tenant, or was an advance by the agent to the landlord; as, in the former case, the landlord could distrain; otherwise not.⁴⁰

And, similarly, whether materials were furnished on the credit of a contractor, or of a building with the intention of enforcing a lien, is matter of fact.⁴¹

§ 114. An intention of warranty need not be expressed in any particular form, but the words employed by the seller must be understood, not as an expression of opinion, but as an absolute assertion; and how the words were taken or understood by the parties is a question of fact.⁴² And it must be the intention of the vendor that his words shall be an inducement to the purchase, and the acceptance of or reliance upon those words on the part of the buyer is also essential, as a motive for his purchase; and whether these elements exist is for the jury to decide;⁴³ for a warranty is essentially part of the contract, so that words merely expressive of opinion do not amount to it, since therein is no mutuality.⁴⁴

§ 115. Whether there is a gift or not, also, is fact, depending on intention; as, for instance, whether it is a gift or a loan,⁴⁵ to be inferred from the circumstances of the case;⁴⁶ always, however, necessarily

⁴⁰ *Parnett v. Anderson*, 14 Eng. L. & E. 371.

⁴¹ *Odd Fellows v. Masser*, 24 Pa. St. 511.

⁴² *Rogers v. Ackerman*, 22 Barb. 135.

⁴³ *Edwards v. Marcy*, 2 Allen (Mass.) 490.

⁴⁴ *Henson v. King*, 3 Jones L. (N. C.) 420.

⁴⁵ *Respass v. Young*, 11 Geo. 116.

⁴⁶ *Deveaux v. Deveaux*, 1 Strobb. Eq. 283.

inclusive of delivery and acceptance.⁴⁷ A promise to give, to take effect at some future time, as upon the decease of the promisor, not accompanied by any delivery, is void.⁴⁸ And whether an actual gift is absolute or conditional, is a question of fact.⁴⁹ And whether services are gratuitous or not, as where plaintiff, on an appointment, rendered services to a corporation as treasurer, without any arrangement for compensation, and there was evidence tending to show that he only expected remuneration from incidental advantages arising from his connection as a partner with another officer of the company.⁵⁰

§ 116. Whether the statement of a party introduced as evidence is to be regarded as an admission, or only as an offer of compromise, where objection is made to its admission as evidence in the case, may be determined by the court, or may, in the discretion of the court, be submitted to the jury, under instructions to disregard it if they find it to have been merely a proposition or offer of compromise.⁵¹

§ 117. A parol submission to arbitration is matter of fact to be determined by the jury from the words used, the meaning attached to them by the parties, and the circumstances of the utterance.⁵²

§ 118. Whether a sale is absolute or conditional is for a jury, the burden of evidence being on him who affirms its absolute quality, or else the performance

⁴⁷ *Betts v. Francis*, 1 Vroom, N. J. 153.

⁴⁸ *Frost v. Administrator*, 33 Vt. 645.

⁴⁹ *Halbert v. Halbert*, 21 Mo. 278.

⁵⁰ *Pendleton v. Stone Dressing Co.* 19 N. Y. 19.

⁵¹ *Bartlett v. Hoyt*, 33 N. H. 165.

⁵² *Houghton v. Houghton*, 37 Me. 74.

of the condition precedent.⁵³ Also where there was a verbal contract to sell and deliver cotton, at a certain time and place, and, about the time appointed, a postponement was made by mutual consent, and it was agreed also that the contract should be reduced to writing, which, however, was not done; and on the last day appointed, the agent of the seller, and the buyer himself, met at the designated place, and the buyer told the agent he should release him from the contract, but the agent made a tender of the cotton, which the buyer refused to accept, it was held, in an action by the seller for the breach, that it was a question for the jury whether, by the second agreement, the parties intended that the original contract should not be binding unless reduced to writing, or only that they should, by reducing it to writing, mutually have more certain evidence of what the contract was.⁵⁴

§ 119. Criminal intent is within the province of the jury, exclusively; as with what intent a child was forcibly taken from its parents;⁵⁵ and an intent of usury where it does not appear on the face of an instrument.⁵⁶ In regard to an intent to kill, the jury are not to be instructed that every man is presumed by the law to intend the necessary and probable consequences of his acts,⁵⁷ but a specific intent to kill must be shown;⁵⁸ although where there is an indictment for malicious stabbing with intent to kill, the

⁵³ *Sawyer v. Spofford*, 4 Cush. 230; *Mitchell v. Napier*, 22 Tex. 598. 128.

⁵⁴ *Adams v. Davis*, 16 Ala. 750. ⁵⁷ *the State v. Biddle*, 29 Mo. 420.

⁵⁵ *Oliver v. State*, 17 Ala. 596. ⁵⁸ *Jeff [a slave] v. State*, 37

⁵⁶ *Orr v. Lacy*, 1 Doug. (Mich.) Miss. 321.

prisoner (in Kentucky) may be convicted of a lower degree of that offence;⁵⁹ as, also, if one be indicted for an assault with intent to commit murder, he may (in Iowa) be legally convicted of an assault and battery.⁶⁰ It is not sufficient to prove a general felonious intent, but the particular intent to kill; but it is held that, in the decision of the question concerning the intention, the jury should act on all the presumptions recognized by the law, and also their own judgment and experience, as applied to all the circumstances of the case in evidence.⁶¹

And in torts, also, it is a question of fact whether one intended to defraud by a conveyance, or in good faith make provision for wife and children.⁶²

§ 120. Whether lands have been actually reserved for school purposes by the Treasurer of the United States, under act of Congress, is held to be a question of fact, and the court erred in deciding that it was a legal presumption in a case of that kind.⁶³

§ 121. In Maine, it is held that the teacher of a district school cannot sue for wages unless having received certificates of qualification. But, also, that if it was not the pleasure of a town to refuse payment for services so rendered because the teacher had neglected to comply with the provisions of the statute, and if the town, accordingly, has paid to the agent of the district the amount which would be required to pay

⁵⁹ *Tyra v. Commonwealth*, 2 Met. 1.

⁶⁰ *Dixon v. State*, 3 Clarke, 416.

⁶¹ *Ogletree v. State*, 28 Ala. 693.

⁶² *Reford v. Cramer*, 1 Vroom, N. J. 251.

⁶³ *Dicken's Lessee v. Mahana*, 21 How. 278.

the instructor, and for his use, and it was so received by the agent, it would thereby become the property of the teacher in the hands of the agent, and could be recovered by suit against the agent. And whether money has been so paid and received, is for the jury.⁶⁴

§ 122. A legal arrest may take place without the actual imposition of the hands of an officer, but with words on his part, and words of submission on the part of the person against whom the warrant is issued, with the intention to arrest understood by both parties. And in such case it was held error for the court to decide the question of intention.⁶⁵

§ 123. Where there is a contract of service for a certain time, and the employed leaves his employer before the expiration of the time, it is held a question of fact, in a suit for wages, whether the plaintiff had justifiable cause for leaving in consequence of ill usage.⁶⁶

§ 124. An intention of waiver is also for the jury, ordinarily. Whether a conversion of property is waived, is held a mixed question of law and fact, to be submitted to the jury under proper instructions.⁶⁷ "A question of waiver is one of intention usually, and depends on acts or declarations which are of an inconclusive or doubtful character, furnishing only grounds of inference, and which, therefore, it is the appropriate province of a jury alone to consider.

⁶⁴ *Dore v. Billings*, 26 Me. 60.

⁶⁵ *Jones v. Jones*, 13 Ire. N. 454.

C. 448.

⁶⁶ *Chapman v. Coffin*, 14 Gray,

⁶⁷ *Traynor v. Johnson*, 1 Head (Tenn.) 51.

The cases are very rare where the court, as a matter of construction, can determine whether the acts or declarations of a party constitute a waiver."⁶⁸ Whether a new subsequent agreement concerning terms of rental operates as a waiver or surrender of the original lease, is matter of fact.⁶⁹ But the question whether the renewal of a note for purchase money, including also other considerations, is a waiver of a vendor's lien, is held matter of law.⁷⁰ And also the waiver of demand and notice in relation to a bill of exchange, arising from the circumstances of the case, is for the court.⁷¹ And, also, where all the facts and circumstances are admitted, the question of waiver is matter of law.⁷²

An administrator may waive the copy of a claim; but the facts and circumstances are to be shown by the claimant, and whether they amount to a waiver is for the jury.⁷³

And where there is conflicting evidence as to the design of a mortgagee in possession who holds possession after the release of his judgment, it is a question of fact whether he intends thereby to waive foreclosure.⁷⁴

And whether acceptance of a part was intended to be a waiver of the remainder, under certain circum-

⁶⁸ *Fitch v. Iron Works*, 29 Conn. 92.

⁶⁹ *White v. Walker*, 31 Ill. 436.

⁷⁰ *Mims v. Lockett*, 23 Geo. 241.

⁷¹ *Orcar v. McDonald*, 9 Gill (Md.) 354.

⁷² *Insurance Co. v. Evans*, 9 Md. 1.

⁷³ *Guines v. Bush*, 16 Ark. 647.

⁷⁴ *Couch v. Stevens*, 37 N. H. 174.

stances.⁷⁵ And the court of Alabama remarked that "ordinarily the acceptance of a part performance without objection, is regarded as a waiver of the entire fulfilment by the other party." And whether a waiver is intended of the lien for freight, where goods forwarded were partly removed by the owner, to whom a bill of lading had been sent, without paying freight.⁷⁶

Where a party to a composition agreement among creditors accepted the percentage allowed thereby, and delivered thereon to the debtor his note, but only on a promise to pay the remainder or secure it, the question whether she had waived her right to refuse to carry out the composition agreement, was held one of fact.⁷⁷

§ 125. What constitutes a domicile is a question of law, but so far as it depends on facts, the question of domicile is one of fact,⁷⁸ as whether a person removing from one town to another intends to change his residence,⁷⁹ and whether an improvement was made with the purpose of a continued residence;⁸⁰ and whether one has a permanent abode who leaves the country, and has his family remain with a relative.⁸¹

§ 126. Where an apparently independent contract in writing is sought to be made dependent by facts

⁷⁵ Wolfe v. Parham, 18 Ala. 449.

⁷⁶ Boggs v. Martin, 13 B. Mon. 244.

⁷⁷ Cobleigh v. Pierce, 32 Vt. 795.

⁷⁸ Pennsylvania v. Ravenel, 21 How. 110.

⁷⁹ Inhab. of Fitchburg v. Inhab. of Winchendon, 4 Cush. 194.

⁸⁰ Jones v. Brownfield, 2 Pa. St. 60.

⁸¹ Adm'r v. Abernathy, 37 Mo. 198.

connected with its making, it is a question of fact whether the contracts were dependent.⁸²

§ 127. In like manner, the question of knowledge is one of fact, as, in the case of defects in a negotiable instrument, whether the purchaser knew thereof so as to be chargeable with a lack of good faith.⁸³ And where the condition of a deed was, that "in case any ardent spirits, cordials, or wines, shall be kept, or sold, on any part of the premises, or in any building erected or to be erected thereon, the deed shall become void, and of no effect," and a tenant violated the condition, the question arose as to the grantee's knowledge of such violation, and his diligence in regard to knowing thereof, it was held to be a question of fact.⁸⁴ Where a wagon was attached in the hands of one, and another claimed the ownership, but it appeared in evidence that the former lived only a few miles from the latter, and had the wagon in constant use as his own, and declared it to be his own, it was held that whether the claimant knew of such acts of ownership was a question of fact, to be determined in view of all the circumstances.⁸⁵

§ 128. Likewise knowledge of the payment of a bill of exchange, where the second of a set of bills was presented, and protested owing to the drawee's absence, and nine days after the first of exchange came to hand, when it, with the costs of the protest, was paid, and two months afterwards suit was com-

⁸² *Younger v. Welch*, 22 Tex. 425.

⁸³ *Goodman v. Simonds*, 20 How. 356.

⁸⁴ *Collins Manuf. Co. v. Marcy*, 25 Conn. 246.

⁸⁵ *Avery v. Clemmens*, 18 Conn. 309.

menced on the protested bill, which suit led to an action for malicious prosecution, whether the plaintiffs in the suit on the bill knew that it was paid at the time they sued on it, was held to be for the jury to decide.⁸⁶

So the knowledge of a person by a witness cannot be determined by the court.⁸⁷

And in regard to accidents, a knowledge, by the owner, of the mischievous disposition of a dog, where a minor son of the plaintiff was bitten by the animal, was properly referred to a jury for consideration, together with the question, as to the estimation of damages, whether the plaintiff had relinquished his claim, previous to the accident, to his son's services by an agreement to give the son fifty cents per day for working for him.⁸⁸

In a case where an employee, ten years of age, was working in a factory, and became entangled in the machinery, and injured, the question of his knowledge of the hazards of the employment arose, under the general rule, as thus enunciated by the court: "Every manufacturer has a right to choose the machinery to be used in his business, and to conduct that business in the manner most agreeable to himself, provided he does not thereby violate the law of the land. He may select his appliances, and run his mill with old or new machinery, just as he may ride in an old or new carriage, navigate an old or new vessel, or occupy an old

⁸⁶ *Weaver v. Page*, 6 Cal. 684.

⁸⁸ *Arnold v. Norton*, 25 Conn. 95.

⁸⁷ *Dickinson v. Lovell*, 35 N. H. 17.

or new house, as he pleases. The employee, having knowledge of the circumstances, and entering his services for the stipulated reward, cannot complain of the peculiar taste and habits of his employer, nor sue him for damages sustained in and resulting from that peculiar service. . . . An employee, having knowledge, cannot claim indemnity, except under peculiar circumstances. He is not secretly or involuntarily exposed, and likewise is paid for the exact position and hazard he assumes; and so he may terminate his employment when, from unforeseen perils, he finds his reward inadequate or unsatisfactory. We need hardly remark, that, as this distinction rests upon knowledge in the employee, it is quite obvious that he must have mind sufficient to acquire the necessary knowledge. How the fact was in the present case (the plaintiff being ten years old), we will not undertake to decide. If the fact was important, we think it should have been submitted to the consideration of the jury.”⁸⁹

§ 129. Closely allied with the subject of knowledge is that of notice. The sufficiency of notice is a question of law; as, for example, where the facts are found, what is, or is not, sufficient notice of payment to charge an indorser,⁹⁰ as evidenced by a notarial certificate.⁹¹ Where parol evidence is resorted to, the jury finds the facts, but the legal sufficiency is still for the court.⁹² Also, the sufficiency of service of a written

⁸⁹ *Hayden v. Manuf. Co.* 29 Conn. 558.

⁹⁰ *Sherer v. Bank*, 33 Pa. St. 141.

⁹¹ *Ricketts v. Pendleton*, 14 Md. 330.

⁹² *Stanley v. Bank*, 23 Ala. 657.

notice, either personal or by the post-office, as the residence of the debtor may be within or without the city;⁹³ although, as to notice through the post-offices, in cases not governed by the law merchant, as negotiable paper, but by the common law, and notice is required to be proved, notwithstanding the mailing of a notice with a proper direction, which is yet *prima facie* evidence that it was received, but not conclusive, and may be rebutted, it is for the jury to say whether the reception has been rebutted.⁹⁴ It is a question of law whether a refusal to accept or pay a draft was notified in reasonable time; although it is for the jury to find the fact of refusal itself. It is also a question of law whether an assignee of a draft delivered on account of a prior debt has used due diligence in trying to recover the sum assigned, from the parties on the draft, liable to the assignor.⁹⁵ And, in general, where the facts are admitted, due diligence in giving notice of dishonor is for the court; but where the facts are disputed, they should be determined by the jury, under hypothetical instructions of the court.⁹⁶

In England, it is held that, in every case where a demand of payment is made on a drawee or indorsee by the holder, on the proper day, it is a question for the jury whether, under the circumstances, there was sufficient notice of dishonor.⁹⁷ And by the Supreme

⁹³ Nevins v. Bank, 10 Mich. 550.

⁹⁴ Walworth v. Seaver, 30 Vt. 730.

⁹⁵ Brooks v. Elgin, 6 Gill (Md.) 259.

⁹⁶ Linville v. Welch, 29 Mo. 204.

⁹⁷ Paul v. Joel, 3 Hurl. & Nor. 463; Weeton v. Hodd, 26 Eng. L. & E. 278.

Court of the United States it is held, that where a bill of exchange is scheduled by an insolvent, it is sufficient notice, when the fact is found by the jury.⁹⁸ And whether a holder, who has taken negotiable paper with notice of defences, has exercised good faith and proper care, is for the jury to decide.⁹⁹ And also notice of the transfer of an account is matter of fact.¹⁰⁰

Whether possession of a vendee with an unrecorded deed is of such a character as to charge with notice a subsequent purchaser, is for the jury also;¹⁰¹ as, for example, a purchaser at a sheriff's sale of an equitable title, which had been assigned to another by the debtor, and the assignment not recorded.¹⁰²

Notice of want of authority to negotiate a bill of exchange, on the part of a seller, to the purchaser, from the words "second of exchange; first unpaid," is a question of law.¹⁰³

In the case of printed notices on contracts, as where a steam-tug is hired at different times to tow a vessel out of a harbor, and on payment the owner received a receipt from the master of the tug, on the back of which receipt was printed a notice that the owner of the tug would not be answerable for the negligence of servants, and finally an accident occurred through alleged negligence, it was held a question of fact whether the contract was made on the terms of the printed notice or not.¹⁰⁴ And, in Massachusetts, it is

⁹⁸ *Hyde v. Stone*, 20 How. 173.

⁹⁹ *Roth v. Colvin*, 32 Vt. 131.

¹⁰⁰ *Saltmarsh v. Bower*, 22 Ala. 232.

¹⁰¹ *Ponton v. Ballard*, 24 Tex. 621.

¹⁰² *Rhines v. Baird*, 41 Pa. St.

264.

¹⁰³ *Bank v. Neal*, 22 How. 108.

¹⁰⁴ *Symonds v. Pain*, 6 Hurl.

& Nor. 712.

held that a printed notice on the back of a passage ticket furnishes no presumption of knowledge by the passenger of the limitations thus imposed by the company, as to the transportation of his baggage; and whether he knew of the notice before commencing the journey, is a matter of fact.¹⁰⁵

Whether one has actual notice of the dissolution of a partnership is likewise for the jury.¹⁰⁶

A usage for guests at an inn to leave their money or valuables on deposit with the proprietor or clerk, does not bind a guest without actual notice; which actual notice is a question of fact.¹⁰⁷

Where there was an outstanding contract between the payor and payee of a note, and the note contained the words "in according to contract," it was held no error to leave to the jury the question whether the words were so unusual, taken in connection with all the other facts, as to convey notice to a purchaser of the note that there was such an outside contract.¹⁰⁸

Legal notice and constructive notice is for the court.¹⁰⁹

¹⁰⁵ *Brown v. R. R. Co.* 11 Cush. 99.

¹⁰⁶ *Deford v. Reynolds*, 36 Pa. St. 334.

¹⁰⁷ *Berkshire Woollen Co. v. Proctor*, 7 Cush. 417.

¹⁰⁸ *Campbell v. Rusch*, 9 Ia. 344.

¹⁰⁹ *Birdsall v. Russell*, 29 N. Y. 249.

CHAPTER VIII.

IDENTITY AND ALTERATION.

§ 130. WHERE a note is misdescribed in a mortgage, it is for the court to determine, from all the circumstances, whether a particular note is the one secured by the mortgage; and if the intention is apparent upon the whole, no error in the details of description will prevail against the equities of the mortgage.¹

§ 131. Where an agreement declared that A had sold to B his stock of goods in a certain town, it was held a matter of fact whether certain particular goods belonged to, or formed part of, that stock.²

§ 132. In a prosecution for larceny of treasury notes, where it was shown by the evidence that certain notes claimed to be identical with those stolen had been found at a place where the prisoner had concealed them, it was held error for the court to instruct the jury that "one note was positively identified," as the question of identity was for the jury to determine, and the court therein stated the effect of the evidence instead of the evidence itself.³

§ 133. Where the same name occurs in two different deeds, so that the question of identity arises as to the grantee in a prior deed and the grantor in a sub-

¹ *Prescott v. Hayes*, 43 N. H. 596.

² *Knight v. Parker*, 25 Ill. 593.

³ *Hill v. State*, 17 Wis. 680.

sequent deed being the same person, it was held to be for the jury, and not for the court, either as a question of law, or a preliminary one of fact to be decided before the admission of the deed in evidence; and the party must satisfy the jury, when he produces the deed, of the identity, or otherwise the deed will be disregarded for not showing the transmission of the title of the previous grantee.⁴

§ 134. The identity of parties is a question of fact; as in a prosecution for having committed perjury in an action of bigamy, wherein the appellant had sworn she was never married to the prisoner, and the prosecution for perjury resulted in conviction, the court, on appeal, said, "The jury was instructed that, unless there was some extraneous fact in evidence to raise a doubt of the identity of the parties, this was to be presumed by the court. This we think was error. We think the question was one of fact, and not of law; and that it was therefore the province of the jury, and not of the court, to judge whether the marriage record was alone evidence strongly corroborating the witness as to the marriage of these identical persons. The names being the same was a fact from which the jury, not the court, might draw an inference; it was some evidence; but whether sufficient or not, it was not for the court to say."⁵ And where a former conviction is pleaded, it is for the jury to determine whether the party convicted was the same as the party under indictment in the later prosecution.⁶

⁴ Carleton v. Townsend, 28 Cal. 221.

⁶ State v. Robinson, 39 Me. 154.

⁵ Hendricks v. State, 26 Ind. 494.

And so as to claimants of land, as purchasers, or heirs.⁷ And it is held that there is no legal presumption that one bearing the name of the son of a certain person is one of the heirs; but the jury is to decide the matter upon concomitant circumstances; such as identity of name, residence of the claimant and other members of the family.⁸

And the question of *idem sonans*, as whether Mealey is of the same sound with Maley, or Malay, when it comes up on the trial of an indictment, in evidence on the general issue, is one of fact.⁹ But, on demurrer, it is a question for the court, in Missouri; so decided by a divided court, however.¹⁰

In Maine, it is held that where there is a judgment rendered against a corporation by a name variant from the one in their charter, and the question arises on an action against the sheriff for trespass in levying an execution, as to whether the corporation were in fact the party to the judgment, it is a question for the jury.¹¹

§ 135. The question of the same cause of action in different suits, as where a former judgment is pleaded, and the issue thereon is, whether such a former judgment has been rendered, is a question of law,¹² though it may, if not pleaded, go, it seems, in evidence to the jury, under the general issue.¹² Where, in tort, there

⁷ *Greene v. Barnwell*, 11 Ga. 285.

⁸ *Freeman v. Loftis*, 6 Jones L. (N. C.) 528.

⁹ *Commonwealth v. Donovan*, 13 Allen, 572; citing 11 Gray, 322, 323, and 14 Gray, 400.

¹⁰ *State v. Hawley*, 21 Mo. 499, 504.

¹¹ *Manuf. Co. v. Butler*, 34 Me. 438.

¹² *Weathered v. Mays*, 4 Tex. 389; *Finley v. Hanbest*, 30 Pa. St. 194.

is a confession that the plaintiff has suffered injury, but the question arises whether it is the same injury as that revealed by the evidence, it is held a question of fact.¹³

§ 136. The identity of articles patented is probably the most common question of the kind, and arises chiefly in actions for infringement. Thus whether two instruments, or machines, are the same;¹⁴ and this is for the jury. And so, where an "improvement" was patented, and the specifications described the pieces of mechanism, and their peculiar qualities, and the manner of combination and the result, it was held that an admission by the plaintiff that pieces of mechanism like his in general nature, and employed for "various purposes," was not an admission that his machine was the same as others; and the fact whether it was or not, was to be determined by the jury.¹⁵ And where a patent is renewed, and the question arises whether the renewal is for the same invention.¹⁶

But, in England, although the evidence showed some difference in the manner of working, it was held that the court decided the question properly, and directed the verdict.¹⁷ And it is held, in the United States, that, in a court of equity, it is discretionary for the court to send to the jury the question whether a reissued patent is for the same invention as the original.¹⁸

¹³ *Corey v. Bath*, 35 N. H. 549.

¹⁴ *Tucker v. Spalding*, 13 Wall. 455.

¹⁵ *Turrill v. Mich. Southern R. R. Co.* 1 Wall. 491.

¹⁶ *Allen v. Blunt*, 2 Wood-

bury & Minot. (U. S.) C. C. R. 127.

¹⁷ *Bush v. Fox*, 38 Eng. L. & E. 1.

¹⁸ *Poppenhusen v. Falke*, 4 Blatchf. C. C. 493.

§ 137. Whether, under the law of copyright, a certain chart is a copy of another, or is the result of an independent survey, is for the jury. And if there is only a small variance, whether the alteration is only colorable, and the one is, in substance, a mere transcript of the other.¹⁹ A note in the report of this case, quoting from Lord Mansfield in a similar case, sets forth the rule thus, in submitting the matter to the jury: "The rule of decision in this case is a matter of great consequence to the country. In deciding, we must take care to guard against two extremes, equally prejudicial, — the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labor; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded. The act that secures copyright to authors guards against the piracy of the words and sentiments; but it does not prohibit writing on the same subject, — as in the case of histories, and dictionaries. In the first, a man may give a relation of the same facts, and in the same order of time; in the latter, an interpretation is given of the identical same words. In all these cases, the question of fact to come before a jury is, whether the alteration be colorable or not; there must be such a similitude as to make it probable and reasonable to suppose that one is a transcript of the other, and nothing more than a transcript. So, in the case of prints, no doubt different men may take engravings from the same

¹⁹ *Blunt v. Patten*, 2 Paine, 402.

pictures. The same principle holds with regard to charts. Whoever has it in his intention to publish a chart may take advantage of all prior publications. There is no monopoly of the subject here, any more than in the other instances; but, upon any question of this nature, the jury will decide whether it be a servile imitation or not. If an erroneous chart be made, it may be corrected, if it thereby becomes more serviceable and useful for the purposes to which it is to be applied. But here you are told that there are various and very material alterations. This chart of the plaintiffs is upon a wrong principle, inapplicable to navigation. The defendant, therefore, has been correcting errors, and not servilely copying. If you think so, you will find for the defendant; if you think it is a mere servile imitation, and printed from the other, you will find for the plaintiffs." ("Verdict for defendant.")

§ 138. On an indictment for homicide, a brother-in-law of the deceased testified to seeing and examining a dead body, about five months after the murder was alleged to have been committed, and specified several points of resemblance; and then the prosecutor asked his opinion whether it was his brother-in-law's body, alleged to have been killed: it was held that the opinion could not be taken, as it was the province of the jury to decide on the identity, from the points of resemblance, the body being much decomposed and altered in appearance.²⁰ And so the identification of a bowl alleged to have contained

²⁰ *People v. Wilson*, 3 Parker Crim. R. (N. Y.) 206.

poison administered to a wife by her husband, was for the jury.²¹

§ 139. Whether a deed does or does not embrace a particular piece of land, as, for instance, land included in a patent and land purchased at a register's sale for taxes, is held in Kentucky to be a question of fact;²² or where lands are conveyed by a general indefinite description, whether these embrace land conveyed by prior unrecorded deed, is held in Pennsylvania in the same way.²³ And the court remarked, "We are far enough from wishing to enlarge the domain of parol evidence. We would that all men would express their agreements in writing; and when they have done so in terms that are intelligible, a jury is not to be permitted to set up some other contract for them; but are to administer that which the parties have written down, as the court expounds it. But when the writing itself refers to a subject matter, without defining it, which is outside of the instrument, the parties must expect a jury to be employed to ascertain it, under the direction of a court always jealous of evidence that touches a written instrument."²⁴

§ 140. Where it is claimed that goods are intermingled, and by the fault of the plaintiff, these are questions of fact.²⁵ And whether wood, referred to by vouchers from the auditor-general's office, and in an

²¹ *People v. Williams*, 3 Parker Crim. R. (N. Y.) 110.

²² *Martin v. Heirs*, 18 B. Mon. 83.

²³ *Hetherington v. Clark*, 30 Pa. St. 396.

²⁴ *Ibid.*

²⁵ *Taylor v. Jones*, 42 N. H. 32.

order from one individual to another, were the same wood.²⁶

§ 141. The alteration of instruments by erasure, or interlineations, is presumed, by law, to have taken place at the time of signing; but if there is any ground of suspicion apparent on the face of the instrument, the time, manner, and intention of the alteration, are for the jury to determine,²⁷ as in a deed,²⁸ or where there are interlineations in a marriage contract.²⁹ But where the alteration is of such a nature as to avoid the instrument, as the erasure of a signature, or a seal, it is to be explained before going to the jury; otherwise not; and in the absence of extrinsic and intrinsic evidence as to when the alteration was made, the law presumes that it was before, or at, signing.³⁰ There is some conflict of authority, however, on this point, as is shown in a New York case, on which the court remarks, "In this conflict of opinion, it appears that the sensible rule, and the rule most in accordance with the decisions of our own state, is that the instrument, with all the circumstances of its history, its nature, the appearance of the alteration, the possible or probable motives to the alteration, or against it, and its effect upon the parties respectively, ought to be submitted to the jury, and that the court cannot presume, from the mere fact that an alteration appears on the face of the instrument (whether under seal or otherwise), that it was

²⁶ *Piper v. White*, 56 Pa. St. 94.

²⁹ *Reinhart v. Miller*, 22 Ga.

²⁷ *Farnsworth v. Sharp*, 4

414.

Sneed (Tenn.) 57.

³⁰ *Stover v. Ellis*, 6 Ind. 154.

²⁸ *Acker v. Ledyard*, 8 Barb.

made after the signing.”³¹ But whether an alteration is material is a question of law.³²

§ 142. And the fact of alteration in an indictment is for the court; whether by erasure,³³ or by addition.³⁴ And also the spoliation of a deposition.³⁵

§ 143. In an action of warranty, it was held that where a sale is not by sample, but by denomination merely, as “Calcutta linseed,” it is a question of fact whether an adulteration of supplied goods is sufficient to change their distinctive character.³⁶

§ 144. Under the Mechanics’ Lien law, whether a particular change in a building constitutes an alteration, or addition, is a question of fact.³⁷

§ 145. Likewise, where a question arises whether the channel of a river has become widened, it is to be decided by a jury.³⁸

³¹ *Maybee v. Sniffen*, 2 E. D. Smith, 10. (See also *Ault v. Fleming*, 7 Clarke (Iowa) 145, *Cole v. Hills*, 44 N. Hamp. 232, *Stockton v. Graves*, 10 Ind. 294, *State v. Flye*, 26 Me. 313.)

³² *Burnham v. Ayer*, 35 Me. 351.

³³ *Commonwealth v. Davis*, 11 Gray, 9.

³⁴ *Hunter v. State*, 29 Ind. 81.

³⁵ *Stith v. Lookabill*, 68 N. C. 227.

³⁶ *Wieler v. Schilizzi*, 33 Eng. L. & E. 334.

³⁷ *Updike v. Skillman*, 3 Dutch (N. J.) 132.

³⁸ *Commonwealth v. Inhab. of Deerfield*, 6 Allen (Mass.) 456.

CHAPTER IX.

AUTHORITY.

§ 146. THE most common question under this head is that of the authority of agents, derived from principals. And it is held that where there is no written appointment, the jury must determine the existence and extent of the agency from testimony concerning his acts as such, and the recognition of those acts by the principal; as, for example, in regard to insurance agency.¹ The relation of principal and agent must exist between an employer and those who build a wall for him, to render him liable for injury by the blowing down of the wall; and whether there is such a relation, in such case, is a question of fact.² However, there must be preliminary proof of agency, before the acts and admissions of an agent are admitted in evidence to bind the principal; and this preliminary proof is for the court.³

Where indorsements were made on a promissory note, in an unknown handwriting, the question of agency was held to be a question of fact.⁴

The scope of an agent's authority, as defined in the letter of a principal, is a question of fact in a collat-

¹ Nicholl *v.* Insurance Co., 3 Woodbury & Minot C. C. 533.

² Benedict *v.* Martin, 36 Barb. 289.

³ Cliquet's Champagne, 3 Wall. 115.

⁴ Valentine *v.* Packer, 5 Ban. (Pa.) 335.

eral action,⁵ as an authority to indorse a note,⁶ or to draw checks,⁷ or to act as deputy in a public office.⁸ And implied authority is for the jury, as well as that admitting direct testimony.⁹

But the extent of the authority of a bank cashier is held a question of law.¹⁰

Whether an agent has exceeded his authority is for the jury; as, in writing a letter,¹¹ or acting as a partner,¹² or transferring a note.¹³

Also, whether a warehouseman, in receiving goods, acted as an agent of the carrier, or of a vendee, in a case of stoppage in transitu.¹⁴

Where a vessel owner agreed to carry a carpenter to California, for his work on the ship in preparing for and performing the voyage, and then, before ready for sea, refused to carry him, unless he would pay \$25, and sign the shipping papers, and the papers were signed and note given to the shipping master for the \$25, and on the day of sailing the carpenter was turned out of the vessel for the non-payment of the \$25, whereupon he brought an action for the breach of contract, it was held that the owner might show a modification of the first agreement, and that it was a question of fact whether the shipping master had

⁵ *Slonecker v. Garrett*, 48 Pa. St. 419.

⁶ *Hawkinson v. Lombard*, 25 Ill. 574.

⁷ *Bank v. Admr.* 37 Ala. 227.

⁸ *McDonell v. Bank*, 20 Ala. 317.

⁹ *Savings Fund v. Hagerstown Savings Bank*, 36 Pa. St. 501.

¹⁰ *Bank v. Hanmer*, 14 Mich. 212.

¹¹ *McClung's Ex'rs v. Spotswood*, 19 Ala. 169.

¹² *London Savings Fund v. Hagerstown Bank*, 36 Pa. St. 507.

¹³ *Krebs v. O'Grady*, 23 Ala. 732.

¹⁴ *Hoover v. Tibbitts*, 13 Wis. 81.

authority to take as cash the note of the passenger, and so whether the passenger had fulfilled his part of the modified agreement.¹⁵

Where the son of a co-surety notified the creditor to bring an action against the principal debtor, his authority to give such notice is a question for the jury.¹⁶ Also whether one is the servant of a corporation.¹⁷ And whether the acts of a street commissioner are within the general scope of his authority.¹⁸

Where a proprietor of a sugar refinery became insane, and the defendants, having an interest in the establishment, told the superintendent to continue the works and employ the necessary help, and thereupon the plaintiff was still retained, it was held a question of fact as to the liability of the defendants, who were accordingly held liable.¹⁹

The question of ratification seems to be subject to some conflict of authority, it being held, in Texas, to be one of law²⁰ usually, unless the evidence is doubtful or susceptible of different interpretations; while, in Illinois, it seems to be held a question of fact, in general,²¹ and, in New York, also, it is held to be for the jury.²²

The New Hampshire court lays down this general rule: "Whenever the justification of any act, alleged

¹⁵ *Holmes v. Doane*, 9 Cush-
ing, 138.

¹⁶ *Klingensmith v. Ex'rs*, 31
Pa. St. 461.

¹⁷ *Burke v. R. R. Co.* 34 N. H.
481.

¹⁸ *Gilpatrick v. City*, 51 Me.
190.

¹⁹ *Colgan v. Aymar, Hill &
Denio*, 28.

²⁰ *Bank v. Jones*, 18 Tex. 828.

²¹ *Fisher v. Stevens*, 16 Ill.

399.

²² *Thom v. Bell, Hill & Denio*,

433.

to be wrongful and injurious, is based on the exercise of authority, whether that authority be incident to the official character and duty of the party exercising it, or arise from the misconduct of the opposite party, and the necessities of the case, the question of the excess of such authority is to be determined by the jury, upon the evidence submitted for their consideration; and not by the court.”²³

And also the question whether there has been any deviation from the authority of instructions,²⁴ in the act of a factor.²⁵

§ 147. In regard to military authority, the general rule is laid down, by the Missouri court, thus: “When the military authority and orders are made to appear, the existence of the emergency or military necessity shall be deemed to be conclusively proved and established by the judgment of the officer, and shall be presumed as matter of law. It operates so far to change the rules of evidence. It makes that a justification and defence which would not have been such before without further proof. In this it is not unlike those statutes which make certain facts proven to have the effect to raise a conclusive presumption of negligence, or liability. The military necessity only is thus conclusively presumed; but the questions whether the military authority or orders existed, in fact, or whether the acts complained of were really done by virtue of such authority, or were the acts of the individual in his private capacity, or were an

²³ *Hilliard v. Gould* 34 N. H. 245.

²⁵ *Sigerson v. Pomeroy*, 13 Mo. 620.

²⁴ *Fagin v. Connolly*, 25 Mo. 87.

abuse of power, or a perversion of orders for private ends, or malicious purposes, would be still open for the determination of the jury.”²⁶ And so in a case where the defence was, seizure by order of the Confederate military authority, and the court decided the question, it was held error; and that it should have been submitted to the jury, whether the defendants had really acted under military authority in seizing the property or not.²⁷

Where one enlisted men in a borough, and afterwards transferred them to another, to fill up a deficient quota, and the first borough brought suit to recover back bounties it had paid for the enlisted men, it was held that if the recruiter were the agent of the borough, duly authorized to enlist, the men could not be thus transferred to another by such agent, and the bounty money could be recovered again. Or, if there was a ratification before the transfer. The court say, “It is true that when one without authority undertakes to act for another, that other may afterwards ratify the act, and thereby avail himself of its benefits, assuming, at the same time, its attendant burdens. Prior to such ratification, however, the agent is at liberty to retrace his steps. He is not obliged to wait an indefinite time, to see whether the person for whom he has acted without authority will adopt his act. Clearly is this so, when, in acting, he has made expenditures, or assumed personal obligations. Such being the law, if the defendants were not authorized by the borough to enlist men and have them placed to

²⁶ *Drehman v. Stifel*, 41 Mo. 208.

²⁷ *Brakebill v. Leonard*, 40 Ga. 62.

the credit of the borough, if they could not, therefore, have recovered from the borough the money paid by them, and the necessary expenses to which they had been subjected in procuring the men, they had a right to protect themselves, and obtain reimbursements of their expenditures by causing the men to be credited to the township at any time before the borough ratified their agency, unless, perhaps, the credit to the borough had been actually consummated. It having been, therefore, a material question whether the defendants had authority to engage men to enter the military service, and be credited on the quota of the borough, the question should have been submitted to the jury, to be answered from the evidence. It was not for the court to answer it, or give to the jury instructions how it should be answered. And we are not without our suspicions that the court intended to submit it to the jury. But the language of the learned judge seems rather to have withdrawn it from their consideration.”* ²⁸

As to the authority of towns to pay bounties for enlistments, it is held that it is not included in their ordinary powers, although it will be held valid where bounties are voted and men enlist under such inducement. And in the case where this is specially decided, in New Hampshire, one had so enlisted for nine months, under an offer of bounty to nine months’

* There seems to be a singular indefiniteness in the statement of the facts in this case, which renders them quite obscure; but this does not affect the point relating to our subject.

²⁸ Hart v. Borough, 56 Pa. St. 26.

men, but receiving an immediate appointment as assistant surgeon, he was enrolled, on the very day of his said enlistment, for three years, instead of nine months; and the question arose as to the liability of the town to pay him the nine months' bounty. And it was held a question of fact whether his nine months' enlistment was genuine, or only colorable; and so whether the town was liable to him for the bounty money. The court remark, "Whether, in the true sense of the law, plaintiff ever engaged to serve for the term of nine months, either as a private or an officer, in such a manner that he might be reckoned as one of the nine months' quota for the town of Danbury, becomes a material inquiry here, and one, under all the evidence, proper to be submitted to the jury."²⁹

§ 148. As to duress, where a father compelled his children, by terrifying threats, to the commission of burglary and larceny, it was held to be for the jury to determine the character and force of the alleged duress, and not for the court; and also the capacity for crime of the children.³⁰

§ 149. Whether a sale by a widow of property belonging to her husband's estate, in order to pay debts, was in pursuance of authority conferred by an agreement with the executor and heirs, is a question of fact.³¹

²⁹ *Stone v. Danbury*, 46 N. H. 140.

³⁰ *State v. Learnard*, 41 N. H. 588.

³¹ *Evans v. Harlee*, 9 Rich (S. C.) 510.

CHAPTER X.

TIME.

§ 150. WHETHER a bill of exchange was indorsed before a supposed acceptance is for the jury.¹ Also the time when a note is overdue, when it depends on circumstances indicating the intention and understanding of the parties;² as where it is made in another state, and controlled by the laws thereof, and is payable on demand, and the question arises whether it is overdue, so as to let in a defence against an indorsee, available against the payee.³

In Texas, it has been held that a contract for the sale of corn, leaving the time of delivery indefinite, as, say two or three weeks, a demand cannot be made for the corn by the purchaser, after the time has passed; and, especially where there is evidence showing that time was material to the seller, it is properly left to the jury what the time of the contract (it being oral) really was.⁴

§ 151. But the most common form in which the question of time arises is that of reasonable time. The general rule is thus laid down: "When the law requires that an act stipulated to be done upon de-

¹ *Weeton v. Hodd*, 26 Eng. L. & E. 278.

² *Carriage Co. v. Kinsella*, 31 Conn. 273.

³ *Barbour v. Fullerton*, 36 Pa St. 106.

⁴ *Steagall v. McKellar*, 20 Tex. 268.

mand shall be performed within a reasonable time thereafter, in determining what that time is, the jury are to ascertain the facts, and the court to apply the law to those facts, in cases where the facts are controverted or doubtful. Where the facts are admitted, or clearly proved, what is a reasonable time is a question of law to be decided by the court." And a reasonable time is defined to be "so much time as is necessary, under the circumstances, to do conveniently what the contract requires should be done."⁵

What is a reasonable time for a patentee to make a disclaimer, who has included in his patent an invention of which he is not the author, is held a question of law.⁶ As, also, reasonable time for one who has the precedence to take out letters of administration.⁷ And for assignees in bankruptcy to act in acceptance of the trust.⁸

But where there are modifications in a contract, by mutual consent, relating to the particulars thereof, this discharges the limited time mentioned therein, and remits the performance to a reasonable time; and this is a question of fact.⁹ And where, in a land contract, the stipulation was as soon as a party could have time to prepare the papers, and send or go to New York, or the north, to sell the land.¹⁰ And also, where a charter party provides for two voyages to

⁵ *Blackwell, &c. v. Fosters*,
1 Met. (Ky.) 95, 96 (quoting
Hill v. Hobart, 16 Me. 168).

⁶ *Seymour v. McCormick*, 19
How. (U. S.) 106.

⁷ *Hughes v. Pipkin, Phille*.
(N. C.) 5.

⁸ *Graham v. Van Diemen's*
Land Co., 30 Eng. L. & E. 578.

⁹ *Green v. Haines*, 1 Hilton
(N. Y.) 255.

¹⁰ *Admr. v. Hardeman*, 15
Tex. 481.

different ports, and secures to the owner the right likewise to send the vessel, after the first voyage and before the second, to any other port in Europe, to load for any port of the United States, proceeding from such port to Mobile to commence the second voyage, whether an offer to perform the second voyage was made in a reasonable time from the completion of the first; and that, too, although the evidence is comprised in written correspondence, showing the dates of the vessel touching at the several ports.¹¹

But it is held in California, that where there is an agreement for an indefinite enlargement of the time of a contract, and the evidence of the agreement is in the letters of the parties, which show that the enlargement was to extend to the contract generally, in all its particulars, the determination of the reasonable time belongs to the court, resting on the general province of the court to construe instruments in writing.¹²

In a case as to the responsibilities of guarantors, where the creditors forbore nine years to proceed against the principal debtor, the court say, "Every case is to be judged by its circumstances. Here was a debt of \$4000, secured by a mortgage of real estate, that had cost the mortgagor that sum; he had paid the interest, and \$1000 of the principal of the debt, and from the time the mortgage fell due till he was sold out, he was in insolvent circumstances. Now, under these circumstances, it was a

¹¹ Murrell v. Whiting, 32 Ala. 67.

¹² Luckhart v. Ogden, 30 Cal. 557.

question for the jury whether the delay was unreasonable, and whether the guarantors were prejudiced by it. All the evidence about the value of the real estate, at different periods, would bear upon this question. Was it negligence, or rather was it a lack of due diligence, to indulge a debtor so long, under such circumstances, the guarantors acquiescing until 1859?"¹³

And it is for the jury to say whether there has been an unreasonable and vexatious delay of payment.¹⁴

In regard to rescinding contract for fraud, it has been held, in Indiana, that "where there are no facts involved but the simple one of the length of time elapsed, it is a question of law. But where disputed facts, involving questions of excuse, of time of discovery of the fraud, &c., as in this case, are to be passed upon, the question, like that of due diligence in the prosecution of an assigned promissory note, is a mixed one of law and fact, and is for the jury. (*Holbrook v. Burt*, 22 Pick. 546; *Kingsley v. Wallis*, 14 Me. 57; *Kelsey v. Ross*, 6 Blackf. 536."¹⁵)

In South Carolina, it has been held that, under a written contract for the purchase of land, at a fixed price, wherein no time of payment was prescribed, and where the purchaser entered and occupied for a year or two, and the vendor gave notice to quit, because of the non-payment of the purchase money, the question of time was for the jury.¹⁶

¹³ *Executrix v. Hatz's Executors*, 52 Pa. St. 530.

¹⁴ *Gatling v. Newell*, 9 Ind. 577.

¹⁵ *Davis v. Kenaga*, 51 Ill. 170.

¹⁶ *Hays v. Hays*, 10 Rich. 421.

And so where an accepted order was to be paid "when certain wharf logs were sold" by the acceptor, and a suit was brought on the order three years afterwards, and the defendant was allowed to show his inability to make the sale, although he had used all ordinary diligence to do so, the question of unreasonable delay was held a question of fact.¹⁷ And so, where a sale is made, but the time of delivery is not specified.¹⁸ And where the delivery was to be "on or about the first of November next."¹⁹

Where a sight draft, drawn at Cincinnati, on May 2, 1861, on persons in Chicago, was received at Detroit on the 4th, but not forwarded for presentment until the 25th (there being a daily mail from Detroit and Chicago, occupying not more than fourteen hours on the passage), and where there was no excuse for the delay, it was held error to leave it to the jury whether the draft was presented in reasonable time, there being no evidence bearing on the point.²⁰

Whether an indorsee, however, has presented a bill of exchange for payment in a reasonable time after indorsement, is a question of fact.²¹ And whether the bill of a broken bank has been returned in a reasonable time after it was received;²² or a counterfeit bill.²³

¹⁷ Wilder v. Sprague, 50 Me. 355.

¹⁸ Heakle v. Smith, 21 Ill. 241.

¹⁹ Kipp v. Wiles, 3 Sandford (N. Y.) 587.

²⁰ Insurance Co. v. Allen, 11 Mich. 506.

²¹ Bank v. Ezell, 10 Humph. (Tenn.) 386.

²² Magee v. Cormack, 13 Ill. 290.

²³ Bank v. Baldenwick, 45 Ill. 376.

It is held that where a consignee, under instructions, deviates therefrom in a sale, and informs the consignor, the latter need not answer immediately to disaffirm the sale, but must do so in a reasonable time, or he will be regarded as ratifying it; and a reasonable time depends on the circumstances of the case, and is, therefore, a question of fact.²⁴ And so where a voidable deed of an infant is not disaffirmed for some time after coming of age.²⁵

And whether an award is made in reasonable time, is for the jury.²⁶ And the sale of property seized under execution, where the statute does not prescribe the time.²⁷ Or a prisoner tried in reasonable time after arrest.²⁸

In a matter of legal provocation, what is time "to cool" from the heat of frenzied passion, between the provocation and the inflicting of a mortal blow in return, is held to be a question of law.²⁹

It is held to be for the jury to determine whether a lumber pile, within the limits of a highway, but outside of the travelled track, is an obstruction within the meaning of the statute, by reason of being left there an unreasonable time.³⁰

In an English case, where plaintiff was driving cattle along a highway at night, and a number of them entered a field through a gap in the fence, and

²⁴ *Porter v. Patterson*, 15 Pa. St. 232.

²⁵ *Scott v. Buchanan*, 11 Humph. (Tenn.) 474.

²⁶ *Haywood v. Harmon*, 17 Ill. 480.

²⁷ *Woodnut v. Knowles*, 14 Ohio St. 27.

²⁸ *Cochran v. Toher*, 14 Minn. 389.

²⁹ *State v. Lizemore*, 7 Jones L. (N. C.) 208.

³⁰ *Chamberlain v. Enfield*, 43 N. H. 360, and cases cited.

the remainder were driven on, and put up for the night, and, in about an hour, plaintiff returned for the straying animals, and defendant had impounded them, it was held a misdirection to tell the jury that they were not taken out in a reasonable time; as this should have been left for the jury to determine.³¹

CHAPTER XI.

LOCATION.

§ 152. THE general rule in regard to boundaries is thus laid down by the Supreme Court of Maine: "What are the boundaries of land conveyed by a deed, is a question of law. Where the boundaries are, is a question of fact. An existing line of an adjoining tract may as well be a monument as any other object [i. e., where there is no government survey]. And the identity of a monument found upon the ground with one referred to in the deed, is always a question for the jury. These propositions have been so often applied in real actions, that no citation of authorities is necessary to sustain them. And upon this question of identity [of lands], parol evidence is always admissible."¹

Where there is a contract for the sale of land imperfectly described therein, the written contract is

³¹ *Goodwyn v. Cheveley*, 4 Hurl. & Nor. 640 (Bramwell dissentiente).
¹ *Abbott v. Abbott*, 51 Me. 581.

valid, if the land is sufficiently described to enable a surveyor to locate it; and it is a question for the jury, unless it is evident from the instrument that it cannot be located; in which case it is void.² And where, on a plat, a lot is described only as lot No. 115, and not otherwise described in the deed, its identification is for the jury.³

What is an "outlot," under Spanish claims, is held to be a question of law;⁴ as also the existence of facts to constitute an outlot of the kind, is a question of fact.⁵ But there seems to be a conflict of authority here, since the United States Supreme Court have decided that whether a lot, and the occupation, cultivation, or possession thereof, came within the purview of the act of 1812 relating to these outlots, was for the jury.⁶ This undoubtedly is governed by the general rule, namely, where the calls of a survey are all ascertained, and there is no need of resorting to extrinsic evidence, it is a question of law. But when parol evidence must be resorted to, in order to identify the calls, the facts are to be found by the jury.⁷ And where a question arises as to which of two roads is meant, it is a question of fact.⁸ And so where land was described in different deeds as being bounded "on the mountain," and "by the mountain," and "the foot of the mountain," it was held that, in the particular case, the words were too indefinite and uncertain

² *White v. Hermann*, 51 Ill. 245.

³ *Bryan v. Fawcett*, 65 N. C. 654.

⁴ *Fine v. St. Louis Pub. Schools*, 39 Mo. 67.

⁵ *Vasquez v. Ewing*, 40 Mo. 256.

⁶ *Savignac v. Garrison*, 18 How. 136.

⁷ *Ott v. Soulard*, 9 Mo. 604.

⁸ *Ibid.*

to control the courses, distances, and other references in the deeds descriptive of the land. Held, also, that it was a question depending both on law and fact, whether these words excluded or included a certain part of the mountain, and that the jury should determine the matter under the instruction of the court. Held, also, that it might be important to this end to determine the location of adjoining tracts.⁹

And so, where parties who had purchased timber growing made division, not by survey, but by a rude draft, without courses and distances, agreeing upon the dividing line as "a brow or ridge of land," marking this on the plat with a pencil, and marking the sections by the names, or initials, respectively, and the vendees of one of the purchasers cut timber on his side of the ridge, but on a part marked to one of the others on the draft, for which he was sued in trespass, it was submitted to the jury, on trial, where the location of the ridge was, and it was held, on error, that the submission was right, since the true location of a disputed boundary line is always a question of fact.¹⁰

And where the line called for was an old line "from A down the bottom with Hill's line to a forked white oak," it was held a question of fact which of two bottoms was meant.¹¹ And so where a will prescribes a line "to a post or corner," &c., and there are two such posts.¹² And where, on the closing line

⁹ Williston v. Morse, 10 Met. (Mass.) 26.

¹⁰ Brown v. Willey, 42 Pa. St. 208.

¹¹ Hill v. Mason, 7 Jones, N. C. 552.

¹² Brownfield v. Brownfield, 12 Pa. St. 144.

of a survey, there were no indications of a corner at the natural point of intersection, but there was an apparent marked corner which could be reached only by a deflection of forty-five degrees, it was held to be properly left to a jury to say whether the marked corner was an original corner; and, if so, whether the partial line had not been abandoned, and another one adopted by the surveyor, by which the first survey had been closed by a straight line running from the admitted to the marked corner.¹³

Where the boundary of a county line is, has been held a question of law, as, for example, when the Juniata River is specified;¹⁴ but it is for the jury to find the facts in an action of ejectment that give it a practical application in matter of private right.¹⁵ Where the description of a lease was, a "coal bank and the appurtenances thereunto belonging," and an action was brought for rent, and eviction set up as a defence, it was held to be for the jury, and not for the court, to determine the extent of the demise, since it was not so much an instrument to be construed as a latent ambiguity to be explained.¹⁶

And although it is usually for the court to decide, from the levy, how much land passes at a sheriff's sale, yet where the generality of terms in the return, or the uncertainty of the description, raises a doubt as to the extent of levy, or the position of the land sold, evidence *aliunde* may be brought in for the jury

¹³ Hunt v. McFarland, 38 Pa. St. 70.

¹⁴ Johns v. Davidson, 16 Pa. St. 521.

¹⁵ Hecker v. Sterling, 36 Pa. St. 428.

¹⁶ Tiley v. Moyers, 43 Pa. St. 411.

to decide the question.¹⁷ But where the written description affords no means of fixing boundaries, the instrument is void for the uncertainty.¹⁸ And, on the other hand, where there is no conflict of evidence, and no doubt, there is nothing for the jury, as the questions of law are for the court.¹⁹

When land was described in a will as the Red House Tract, what that tract was, in its limits, was held to be a question of fact.²⁰ And so, where the description in the declaration was "extending southwardly along the said low water mark to the mouth of Cohoeksink Creek, as it was before diverted from, and thrown to the northward of, its original course, by the erection of wharves on the south side one hundred and fifty-nine feet, more or less," it was left to the jury to say whether there had been an encroachment by the creek upon the land, in consequence of the erection of the wharf.²¹

Where a sheriff's advertisement described land merely as "the farm on which A B now lives," and then, in his deed made in pursuance of the sale, included by description a tract formerly belonging to the said farm, but which, at the time of advertising, had been sold, and was in possession of the grantee, it was held to be for the jury to determine whether the tract was included in the advertisement, and a

¹⁷ *Hoffman v. Dauner*, 14 Pa. St. 27.

¹⁸ *Archibald v. Davis*, 1 Cal. 325.

¹⁹ *Ramage v. Peterman*, 25 Pa. St. 349.

²⁰ *Baynard v. Eddings*, 2 Strobb. S. C. 377.

²¹ *Naglee v. Ingersoll*, 7 Barr (Pa.) 189.

charge from the court directing a verdict in favor of the sheriff's grantee was held erroneous.²²

Whether a fence is located on one side or the other of the true division line, is fact for the jury.²³ And whether a particular lot in San Francisco was included in the original Mexican grant, as also the question of the boundaries of the grant.²⁴

Whether a particular "stake" is the monument referred to in a deed, is also a question of fact.²⁵ And so, whether a marked corner, made at the time the deed was executed, but not specially named, was intended to be adopted in the deed, or it was intended by the grantor that distance and course should prevail.²⁶ And whether course and distance are abandoned, where the evidence as to the identity of a line of another tract called for in a deed is unsatisfactory, and to reach it requires a great deviation.²⁷ And whether the courses and distances will carry the lines to certain points claimed by a party in the cause pending, where there are no fixed monuments, or corners, mentioned in the deed.²⁸ It is also for the jury to determine the relative situation of the lands of the plaintiff and of the defendant, and the natural drainage of the soil, in an action for damages in cutting a ditch, and constructing a levee.²⁹ And, in Texas, it was held properly left to a jury whether land lay in

²² *Todd v. Philhower*, 4 Zab. (N. J.) 797.

²³ *Clowers v. Sawyers*, 1 Head. (Tenn.) 157.

²⁴ *Ferris v. Cosver*, 10 Cal. 622, and cases cited, 625, &c.

²⁵ *Robison v. White*, 42 Me. 216.

²⁶ *Saffret v. Hartman*, 5 Jones L. (N. C.) 188.

²⁷ *Rodman v. Gaylord*, 7 Jones L. (N. C.) 264.

²⁸ *Opdyke v. Stephens*, 4 Dutch (N. J.) 85.

²⁹ *Williams v. Bridge*, 14 La. An. 721.

the *empresa* of Martin De Leon, and this decision was confirmed by the United States Supreme Court.³⁰ And it is for the jury to decide, in the case of lands not laid out by government survey, whether any, and what, variation may be allowed in the location of lands.³¹ And whether a state warrant has been shifted, or laid on the land it calls for, is a matter of fact.³²

Whether a settler on public land has followed up his settlement with improvements, so as to confirm his title against a subsequent possessor, is likewise for the jury.³³

Where the location of a way is, also.³⁴ And whether there is such a place as is designated, where it is situated, and what are its limits, when the place is not a public corporation.³⁵ And where, in a state, an offence was committed, when it was committed on board of a vessel in harbor, near the shores of different states, or whether it was committed beyond the jurisdiction of a state.³⁶ And where it was alleged, in an indictment, that a barn was set fire to, "said barn then and there being in the curtilage [that is, court yard] of the dwelling-house," &c., on the trial, it appeared that the barn referred to was on the corner of a certain lot; whereupon the defendant maintained that the barn was not in the curtilage of the

³⁰ White v. Burnley, 20 How. 247.

³¹ Wilson v. Inloes, 6 Gill. (Md.) 163.

³² Cassidy v. Conway, 25 Pa. St. 244.

³³ Staininger v. Andrews, 4 Nev. 67.

³⁴ Pettingill v. Porter, 8 Allen, 6.

³⁵ Blanding v. Sargent, 33 N. H. 245.

³⁶ United States v. Jackalow, 1 Black. 487.

dwelling-house, as alleged in the indictment; and contended that this was a question for the court, and not for the jury. Notwithstanding, the judge decided that it was matter for the jury, and verdict was against the defendant. Held correct.³⁷

Whether an addition to the city of Baltimore was made according to the location on the plat, and was in pursuance of the act of 1745, has been held a question of fact.³⁸

CHAPTER XII.

TITLE.

§ 153. WHETHER one is a "mill-owner within the meaning of the law relating to mills and mill-dams," is for the court to determine, in an action of trespass for flowing lands.¹

§ 154. On the general rule, the construction of deeds, and their legal effect, are strictly within the province of the court; and evidence of the acts and declarations of a grantor, not amounting to a definite location of the land conveyed, cannot be admitted to show, contrary to the terms of the deed, what land was intended to be included.² The proof of execution is addressed to the court;³ and in ejectment the court must determine as to the proper parties, and the

³⁷ *Commonwealth v. Barney*,
10 Cush. 482.

³⁸ *Lessee v. Inloes*, 4 Md. 187.

¹ *Large v. Ovis*, 20 Wis. 699.

² *Dean v. Erskine*, 18 N. H. 83.

³ *Stark v. Barrett*, 15 Cal. 372

validity and effect of a grant from which title is de-raigned; as to its contents, when lost, and the validity and effect of mesne conveyances under it, and as to the validity of orders in the probate court resulting in deeds.⁴ Also, whether a mortgage has been properly executed and acknowledged;⁵ and *what* the boundaries are, in the call of a deed, although it is for the jury to say *where* they are;⁶ and the reformation of a mistake in a deed;⁷ and who holds the title to real estate, from the deeds introduced in evidence;⁸ and the legal effect of a deed in which there is an evident material alteration.⁹

Where a debtor gives a mortgage of personal property, reserving therein the power of disposing of the property, it is void as against creditors; and it is for the court to decide whether such power is reserved by the terms.¹⁰ And so, where a debtor mortgaged the contents of his store and dwelling-house, "and also such personal property as should hereafter be in the said premises, or which might be substituted in place of such articles as might be sold in the course of his business," it was held void, as creating a trust for the use of the mortgagor; and, further, that its validity was exclusively a question of law.¹¹

§ 155. On the other hand, parol evidence is admissible to remove a latent ambiguity in a deed or will;

⁴ Seaward v. Malotte, 15 Cal. 304.

⁵ Bullock v. Narrott, 49 Ill. 65.

⁶ Whittelsey v. Kellogg, 28 Mo. 407.

⁷ Gray v. Hornbeck, 31 Mo. 401.

⁸ State v. Delong, 12 Iowa, 455.

⁹ Montag v. Linn, 23 Ill. 556.

¹⁰ Freeman v. Rawson, 5 Ohio St. 1.

¹¹ Spies v. Boyd, 1 E. D. Smith (N. Y.) 445.

and it is held that where such evidence is given, the entire evidence, inclusive of the instrument, goes to the jury;¹² as, for instance, where the description is indefinite and doubtful, being susceptible of more than one application;¹³ or where there is a partially blank description, as "white —" in reference to a corner, and there is a white oak in the course of a marked line, and other circumstances tending to explain that this white oak is the corner intended;¹⁴ although inferences from words actually expressed belong, of course, to the court.¹⁵

Whether a particular use of water for saw-mill purposes interferes with the grist-mill privileges of another using the same stream, is a question of fact.¹⁶ Also, the identity and the possession of land;¹⁷ and the fact of sale, and extent of purchase, and payment of the price, and delivery of possession, under a contract of sale forty years old;¹⁸ and whether there was such possession of prior grantees as to give a purchaser notice of unrecorded deeds;¹⁹ and whether circumstances, concurring with long peaceable possession, prove a presumed existence of a lost deed;²⁰ or presumption of title from possession alone. (See 4 McLean U. S. 549.)

¹² *Symmes v. Brown*, 13 Ind. 319.

¹³ *Bell v. Woodward*, 46 N. H. 329.

¹⁴ *Dobson v. Finley*, 8 Jones (N. C.) 495.

¹⁵ *Wheeler v. Schroeder*, 4 R. I. 392.

¹⁶ *Douglass v. Whittemore*, 32 Vt. 690.

¹⁷ *Hicks v. Davis*, 4 Cal. 67.

¹⁸ *Richards v. Elwell*, 48 Pa. St. 362.

¹⁹ *Bryan's Lessee v. Hawey*, 18 Md. 127.

²⁰ *Townsend v. Adm'r*, 52 Vt. 190; *Taylor v. Watkins*, 26 Tex. 690.

Where a father purchased land, and took the deed in the name of his son, who bore the same name, with the addition of "jr.," and lived in the same town; and, in taking the deed, he said nothing about acting as the agent of his son, so that the seller supposed the father was the grantee himself, to whom he was deeding the land; and some evidence tended to show that the son had furnished the money, and authorized the father to buy in his name, it was held for the jury to determine which was the grantee in the deed, or who was the real purchaser.²¹

An excessive levy, and inadequacy of price on a sheriff's sale, is a question of fact.²² Also the genuineness of a deed, where, on trial, the defendant introduced a copy in evidence bearing date the same day with one the plaintiff had introduced, which was defective, but substantially the same with that of the defendant, and the plaintiff claimed the latter to be a forgery.²³ And, in general, whether a conveyance is to be presumed from circumstances claimed to be sufficient.²⁴

Whether a deed was actually executed and delivered at the time of its date, is for the jury.²⁵ And it has even been held, in Maryland, that the fact that all the evidence was offered on one side to prove delivery on the day of date, did not authorize the court to withdraw the question from the jury; or assume that the jury could not find it to have been delivered on

²¹ *Prentiss v. Blake*, 34 Vt. 460.

²² *Baker v. Clepper*, 26 Tex. 634.

²³ *Pratt v. Battles*, 34 Vt. 396.

²⁴ *Blake v. Davis*, 20 Ohio St. 241, and many cases cited.

²⁵ *Genter v. Morrison*, 31 Barb. 157.

another day.²⁶ No particular form of delivery is required; and when any circumstances are proved, no matter how slight or inconclusive, from which a delivery may be inferred, the court has no right to instruct the jury that there is no evidence of a delivery, but must submit the matter to them to weigh the evidence.²⁷ But whether a deed which has been delivered, shall take effect absolutely or conditionally, the condition not being expressed therein, cannot be shown by parol evidence.²⁸

What amounts to a final delivery and acceptance is a question of law; but whether the facts exist which constitute delivery, is a question of fact; so that the whole is a mixed question of law and fact to be left to the jury, under the instruction of the court.²⁹

Where a deed of bargain and sale was executed and acknowledged, and on the same day recorded, whether the grantee knew of it, and gave his assent, is for the jury.³⁰

An instruction was held error which thus charged, "If the jury believe, from the evidence, that B. should remain in the possession of the property until P. took possession of it on the failure of the first note," &c., in that it referred one feature of the mortgage to the jury for construction, whereas it is the province of the court to construe the instrument, not only in its entirety, but in every clause.³¹ Yet a new trial will

²⁶ Barry v. Hoffman, 6 Md. 86.

²⁷ Floyd v. Taylor, 12 Ired. (N. C.) 47.

²⁸ Lawton v. Sager, 11 Barb. 351.

²⁹ Adm'rs v. Earl, 1 Spencer (N. J.) 363.

³⁰ Bensley v. Atwill, 12 Cal. 236.

³¹ Price v. Mazange, 31 Ala. 709.

not be granted if the construction of an instrument is improperly left to a jury, and they decide correctly upon it.³²

§ 156. As to the interpretation of surveys, the Supreme Court of Ohio lays down this general rule: "Where an original survey has been made by the true meridian, and contracts are made and deeds executed for parts of such surveys, calling for, and adopting the calls of parts of the original lines of the survey in the description, it is clear that such calls of the original courses mean the true meridian; and if the contracts or deeds thus made call for courses originally surveyed by the magnetic meridian, it is equally clear that such calls mean the magnetic meridian. In the subdivision lines, and in contracts of sale and deeds for parts of sections originally surveyed by the true meridian, subdivision lines having no reference to the original lines would, in general, be surveyed by the magnetic meridian, as such is the usual mode of surveying lands in all parts of the state. It is manifest from all this that, in respect to surveys in this state, 'west,' or 'due west,' in one class of original surveys, means a line at a right angle to the true meridian, and in another class, 'west,' or 'due west,' is west according to the bearings of the surveyor's compass at the time of the original survey. In giving, then, an interpretation to these words, a fixed, determinate, judicial construction cannot be adopted, and their meaning must frequently depend upon, and be controlled by, extraneous facts.

³² *Morse v. Weymouth*, 28 Vt. (2 Wms.) 829.

"In the case before us, the fact that the original section was owned in common, that the calls of the courses of the original survey were for the true or the magnetic meridian, that the original purchasers from the government, or their representatives, in using the words 'due west,' were, or were not, doing so with a view of a subdivision of the section between them and with reference to the original courses, were proper subjects of inquiry and consideration for the jury, under the direction of the court, to determine the disputed line."³³

§ 157. The proceedings of an administrator in the sale of real estate, it seems, should be left to the jury, as to the presumption of their correctness, after a long time has elapsed, with possession of the land by the purchaser at the sale.³⁴

§ 158. The disaffirmance of the deed of a minor by deeding the land to a third person, is a question of law.³⁵ Also, whether a deed is void on the face of it, as to creditors.³⁶ And an issue as to reforming a contract for the sale of land.³⁷

§ 159. Whether land was purchased by one as trustee, has been held to be for the jury; as where a judgment creditor levied on lands, and then made an assignment to another for the use of creditors, with a resulting trust to himself, then marked the judgment to the use of the assignee, who afterwards bid in the land, but failed to have the deed fully executed for

³³ *McKinney v. McKinney*, 8 Ohio St. 426.

³⁴ *Doolittle v. Holton*, 26 Vt. 589.

³⁵ *Peterson v. Laik*, 24 Mo. 544.

³⁶ *Bank v. Inloes*, 7 Md. 393.

³⁷ *Olendorf v. Cook*, 1 Lansing (N. Y.) 42.

seventeen years, all of which time, excepting the first year, the judgment creditor had occupied the land, by himself and tenants; when it was sold on a judgment against the former judgment creditor to the plaintiff, the former purchaser giving no notice of title; it was held that the jury were to determine whether the former purchase was in the character of a trustee.³⁸ And, in general, a trust by implication.³⁹

§ 160. Whether there has been a breach of the covenant of seisin is a question of law; although, in such case, the estimation of damages belongs to the jury.⁴⁰

§ 161. Under the conveyance act of Illinois, requiring color of title obtained in good faith, it is held that the color of title is a question of law, and that of good faith a question of fact.⁴¹ Also, the question whether a mortgage for a larger sum than was due was in good faith designed to cover future advances, is held to be for the jury.⁴²

§ 162. It is the province of a jury to find the existence of a title by prescription.⁴³ Thus, a case occurred in New York city, of which the syllabus of the reporter is as follows: "Where a bill was filed by the owners of certain piers, in the city of New York, against the corporation of the city and others, claiming that the plaintiffs were entitled to the entire

³⁸ *Benson v. Adam*, 3 Barr. (Pa.) 228.

³⁹ *Noel v. White*, 37 Pa. St. 523.

⁴⁰ *Hall v. Gale*, 20 Wis. 297.

⁴¹ *Wright v. Mattison*, 18 How. 50; *Woodward v. Blan-*

chard, 16 Ill. 424; *Shackleford v. Bailey*, 35 Ill. 387; *Blanchard v. Pratt*, 37 Ill. 243.

⁴² *Tully v. Harloe*, 35 Cal. 306.

⁴³ *Anderson v. Bock*, 15 How 329.

wharfage derived from the outermost ends of those piers; that they had enjoyed such wharfage from the first sinking of the piers in the year 1809; that, upon the extending of the piers in 1839, they assented to the extension on the condition that their exclusive rights to such wharfage should be reserved to them; and the defendants insisted that they and the plaintiffs were tenants in common, that there had been no actual ouster, nor acquiescence by them in the exclusive enjoyment of the right by the plaintiffs, and that there was no sufficient proof to warrant the court in presuming a grant; — held, that it was the province of a jury to determine whether or not a grant would be presumed; and that the question to be submitted to the jury would be whether the plaintiffs, and those under whom they claimed, had acquired by prescription an exclusive right to the whole of the wharfage at the outermost end of the piers, previous to their assent to the extension in 1839.”⁴⁴

§ 163. As to the dedication of a highway, it is held that more depends on the assent of the owner of the land than upon the length of time it is used; and that no time, however long, can operate as a dedication when the circumstances of such use do not indicate such an intention;⁴⁵ and especially where the population is sparse. In Illinois, however, it is held that a user for the period of limitation will amount to a dedication; and the jury are to find the user, or the actual fact of dedication, as the case may be.⁴⁶

⁴⁴ *Thompson v. City*, 3 Sandf. 488.

⁴⁶ *Daniels v. People*, 21 Ill. 442.

⁴⁵ *Shultzner v. State*, 43 Ala. 30.

The jury may infer an intention to dedicate a street, from circumstances, or from acts or declarations of the owner, and an acceptance from listing for taxation, &c., by the municipality;⁴⁷ and acts of an unequivocal character of the owner and the public will establish the fact of a dedication, in a short period of time, quite independently of the limitation period.⁴⁸ In a case of private ways, a user for the limitation period is for the jury.⁴⁹ And where a defence, in an action of trespass, was that the way over which the defendant passed was a private, or by-road, it is a question of fact whether it really was or was not such by-road.⁵⁰ And where premises are demised or conveyed "with right of way thereto," the jury are to say what is a reasonable use of this right.⁵¹

§ 164. In patent titles for inventions, it is held that where one files an application for a patent, intending to file a new one, which he also does, the two applications are to be regarded as parts of the same transaction, and both as constituting one continuous petition, and that the question of the continuity of the application is for the jury.⁵²

But the meaning of the specifications in a patent belongs to the court; and if it cannot be satisfactorily determined from the face of the instrument, it is void for uncertainty. So, where a patent for propelling vessels left it uncertain whether the patentee's claim

⁴⁷ *Wilder v. City*, 12 Minn. 195.

⁴⁸ *Connehan v. Ford*, 9 Wis. 244.

⁴⁹ *Steffy v. Carpenter*, 37 Pa. St. 43.

⁵⁰ *Van Blarcom v. Frike*, 5 Dutch (N. J.) 517.

⁵¹ *Hawkins v. Carbines*, 3 Hurl. & Nor. 914.

⁵² *Godfrey v. Eames*, 324, — Clifford, J., dissenting

was for a wheel with spiral construction, or merely spiral paddles to a wheel, and the court below instructed the jury that "the question whether the specification was ambiguous in that particular was one compounded of law and fact, and that, if they should find that a spiral wheel and a spiral propeller were the same thing, in ordinary acceptation, then the specification was sufficiently certain," it was held error.⁵³ And, in England, where there were two inventions for accomplishing the same purpose, in an action for infringement it was held that it was for the court to construe the specifications.⁵⁴

The general principle as to what is for the jury is thus laid down by the Supreme Court of the United States: "It is the right of the jury to determine, from the facts in the case, whether the specifications, including the claim, were so precise as to enable any person skilled in the structure of machines to make the one described. This the statute requires; and of this the jury are to judge. They are also to judge of the novelty of the invention, and whether a renewed patent is for the same invention as the original; and whether the invention has been abandoned to the public. There are other questions of fact which come within the province of a jury, such as the identity of the machine used by the defendant with that of the plaintiff, or whether they have been constructed and act on the same principle."⁵⁵

The surrender of the rights of the inventor, is a

⁵³ *Emerson v. Hogg*, 2 Blatch C. C. 1.

⁵⁵ *Battin v. Taggert*, 17 How. 84.

⁵⁴ *Bovill v. Pimm*, 37 Eng. L. & E. 442.

question of fact, which occurs when it is charged that another has surreptitiously obtained the knowledge of the invention, and has pirated its use before a patent has been secured by the real inventor; who holds against the pirate, as well as others, after the date of his patent.⁵⁶

§ 165. A patent for land is subject to the same rules of construction as are other instruments in writing.⁵⁷

§ 166. In matters of tenancy, where the facts are admitted in writing, there is nothing for the jury, of course; but it is held that all inferences from the facts so stated and admitted are questions for the jury exclusively, while the court is confined to the facts themselves, and their meaning and legal effect; as, whether the legal relation of landlord and tenant existed, and whether the tenancy was such as to make a notice to quit necessary to entitle the landlord to maintain ejectment.⁵⁸

Whether a tenant holds over with the acquiescence of his landlord, is a question of fact.⁵⁹ And whether he holds on any of the terms of the former lease.⁶⁰ And whether a tenant in possession is a tenant of the defendant or of the plaintiff's lessor, the one claiming title through a sheriff's sale on execution, and the other through a deed of bargain and sale.⁶¹

§ 167. As to a will, where it appears on its face to

⁵⁶ *Kendall v. Winsor*, 21 How. 327.

⁵⁹ *Ish v. Chilton*, 26 Mo. 259.

⁶⁰ *Hyatt v. Griffiths*, 33 Eng.

⁵⁷ *Brown v. Huger*, 21 How. L. & E. 75.

318.

⁶¹ *McAulay v. Eamhart*, 1

⁵⁸ *Howard, Lessee, v. Carpenter*, 22 Md. 23.

Jones L. (N. C.) 503.

be a deed or distribution of property *inter vivos*, the question is for the court. It is construed to be a will, whatever its form, if it is not to take effect until the death of the giver.⁶² But if doubt arises from its imperfect nature or otherwise, the facts are to be found by a jury, including the fact of its delivery, and the intention and purpose of its execution. The court, however, is to give proper guidance in the construction of the terms of the instrument.⁶³

But whether a formal will has been executed with due formalities, is for the court;⁶⁴ as the signing and attestation thereof;⁶⁵ and whether it contains special trusts.⁶⁶

As to revocation, where, after the death of a testatrix, there was discovered, in a barrel of waste papers, a will twenty-five years old, worn, or torn into several pieces, which were scattered about among the papers in the barrel, it was held to be for the jury to decide whether the injury was done to the instrument by the testatrix or some other person, and if by her, whether it was accidental, or intentional, and for the purpose of revocation; and, to aid them in this, it was also held that the declarations of the testator that she had destroyed it, made after the date, were admissible in evidence.⁶⁷

The degree of capacity in the testator, to enable him to make a valid will, is held to be for the court;⁶⁸

⁶² Sartor v. Sartor, 39 Miss. 760; citing cases.

⁶³ Ferguson v. Ferguson, 27 Tex. 342.

⁶⁴ Rae v. Taylor, 45 Ill. 491.

⁶⁵ Riley v. Riley, 36 Ala. 499.

⁶⁶ Wilson v. Whitfield, 38 Ga. 283.

⁶⁷ Lawyer v. Smith, 8 Mich. 423.

⁶⁸ Overton's Heirs v. Exec'r, 18 B. Mon. 63.

but the fact of capacity is for the jury.⁶⁹ And persons who are not experts may testify as to sanity, or insanity, giving the circumstances from which they formed their opinions.⁷⁰ There is some conflict of authority here, but the great weight of authority confirms this statement.

As to the ratification of a will by a legatee, in accepting its provisions, it is a question for the jury.⁷¹

CHAPTER XIII.

POSSESSION.

§ 168. WHAT constitutes possession is for the court; but the fact of actual possession is a question for the jury; as where there was a verbal lease, and the lessee entered on part of the premises, and afterwards other parties occupied the remainder under other leases, and suit was brought under the first lease for possession, because of non-payment of rent, it was held, 1. That demand must be made before suit. 2. That the other parties could not be sued under the first lease, unless they entered under the lessee, or after possession by the lessee, or else that they dispossessed him illegally; and that the matter of their actual possession was for the jury.¹ Possession may be held in different modes; by enclosing, cultivating,

⁶⁹ *Ware v. Ware*, 8 Greenl. (Me.) 50.

⁷⁰ *Roe v. Taylor*, 45 Ill. 489.

⁷¹ *Duffey v. Presbyterian, &c.* 48 Pa. St. 50.

¹ *Blackman v. Welch*, 44 Mo. 45.

erecting buildings, or other improvements, or by any use indicating an appropriation of the premises; all of which are matters of fact.² But any instruction which refers to the jury the question of "legal possession," is erroneous, since the legality is for the court.³ And also the kind of possession, — continuous or interrupted, — and the length of time, in the legal effect thereof,⁴ leaving to the jury whether an interruption really occurred, or the whole time was occupied by the possession. If there is no evidence applicable, the matter is for the court, as where, in Texas, the plea of limitations was put in as a defence, but the documentary evidence showed that neither the plea of five years', or of three years' possession could be sustained, it was held error for the judge to submit the question to the jury.⁵ In Louisiana, where an action of jactitation or slander of title was brought, — which can only be brought by one in possession, — and an exception to the petition was filed on the ground that plaintiff was not in possession, and the exception was overruled by the court because it went to the merits of the cause, and afterwards a jury was impanelled, to whom was submitted the questions of possession, and of title, on appeal, it was, at first, held, that the question of possession was properly before the jury, as the court below had previously decided; but, on rehearing, this was reversed, and it was held that title only was before the jury, and reciprocal claims for damages.⁶ But I confess I do not

² *Truesdale v. Ford*, 37 Ill. 212.

³ *Blanchard v. Pratt*, *ibid.* 245.

⁴ *Groft v. Weakland*, 34 Pa. St. 308.

⁵ *Chandler v. Von Roeder*, 24 How. (U. S.) 225.

⁶ *Arrowsmith v. Durell*, 14 La. An. 849.

understand how the overruling of the exception could withdraw the fact of possession from the jury, any more than a demurrer in ordinary cases has a similar effect.

Whether lessees who, before the term stipulated, had been allowed to occupy a store-room, in order to prepare it for their business, in a large hotel building, — the lease stipulating that, at the commencement of the term, the hotel building should be ready, and also that, should the premises become untenable by fire, the term should thereon cease, and a fire occurred in a little more than two months after the commencement of the term, the hotel being still unfinished, — had ever in fact entered on the term and taken possession of the store, was held to be a question for the jury, in an action for rent for the two months.⁷

§ 169. Constructive as well as actual possession is held to be often within the province of the jury. Thus, where a building, on a lot occupied by defendants, was destroyed by fire, and the plaintiffs immediately afterwards built a canvas house on the rear part of the lot, and rented the front to another, under an agreement that he should make valuable improvements, but he obtained a cancellation of his lease, and moved away the buildings he had built, in pursuance of the agreement, and on the same day the defendants began to build instead thereof a store-room, which they occupied or rented when finished, the canvas house still remaining, and an action of forcible entry and detainer was brought by the plaintiffs, on the trial of which it was maintained that the plaintiffs' posses-

⁷ *La Farge v. Mansfield*, 31 Barb. 347.

sion of the property in dispute was insufficient to maintain the action, the court laid down this rule: "It would be extremely difficult to define the exact possession which the statute was designed to protect, and the muniments of title requisite to establish a constructive possession. The plaintiff in error claims that there should be an actual *possessio pedis*, and that the rule that possession of a part of a tract of land marked by distinct natural or artificial boundaries, with a claim of title to the whole, draws after it the constructive possession of such lot or tract of land, does not apply for the purpose of an action like the present; that the statute was passed to prevent the public peace from being disturbed by the illegal and forcible entries upon land which was held by occupancy and possession, and cannot be extended to cases where the party's possession is constructive, or his right to possession arises from implication of law; that in such cases he should be turned over to his remedy by ejectment, and the court held that, —

"What is actual and what is constructive possession, in many cases, must be a question of fact for the jury. The possession and cultivation of one acre of land, without acts of ownership and dominion, would not necessarily draw after it the possession of six hundred and forty acres, unenclosed and unimproved; neither should the actual possession of one half a town lot be so construed as to limit the party's possession to the part so occupied, without regard to the acts of ownership exercised over the remainder. It would be a great hardship to require a party, in every instance, to enclose his lands by a substantial fence;

such enclosure would be evidence of possession, but the absence of it would not be conclusive as against other acts of possession. An examination of the evidence in this case shows, that the jury might very properly have found an actual possession of the premises in dispute in the plaintiff, at the time of the entry, and we will not disturb this conclusion of fact.”⁸

§ 170. Whether the widow and administratrix of one who purchased land at an administrator’s sale, which was set aside after he had occupied it a year, and his widow continued to occupy after his death, was liable, either individually or as administratrix, for the use and occupation of the land, was held a question of fact for the jury.⁹

§ 171. Where a brother and two adult unmarried sisters entered on an abandoned improvement, cleared it, and lived on it many years, the sisters claiming ownership with the brother; and aiding in its cultivation, and in paying for labor done on it by hired hands, and for this purpose carrying on weaving, &c., it was held a question of fact, whether the entry and settlement was that of all, or of the brother only, as the actual head of the family.¹⁰ And in case of sale by the brother alone, it was decided that the facts of relationship and family association could be submitted to the jury to determine whether the sisters had knowledge of the sale, but that an equitable estoppel against them could not be inferred from mere relationship, in their assertion of title.

⁸ *O’Callaghan v. Booth*, 6 Cal. 65.

¹⁰ *Iron Co. v. Tomb*, 48 Pa. St. 391.

⁹ *Patrick v. Adm’r*, 27 Tex. 581.

§ 172. And so, where a husband lives with his family upon his wife's separate real estate, using it as though he were the absolute owner, whether he held as her tenant, or what is the character of his possession, is for the jury.¹¹ And so, whether money loaned by a wife as her separate property was the money of the husband furnished to her by him.¹²

§ 173. In cases of assault, where the defence is *son assault demesne*, and in protection of the defendant's actual possession, and where both parties claim the possession, it is for the jury to determine which party had the actual possession at the time the assault was committed.¹³

§ 174. What constitutes adverse possession is for the court, but the facts to establish that possession are to be found by the jury.¹⁴ "To sustain a title by adverse possession, the defendant must prove a continued, open, visible, and exclusive possession. His possession, moreover, must be marked by definite boundaries, designated either upon the land itself, or by the description in his deed. The land must have been in the constant and uninterrupted possession of the defendant, and those under whom he claims, the length of time prescribed by the statute of limitations. It must be a continued possession; an occasional exercise of dominion, by broken and interrupted acts of ownership, either by the same person, or by different persons, will not establish a right. The legal title

¹¹ *Albin v. Lord*, 39 N. H. 200.

¹² *Black v. Nease*, 37 Pa. St. 436.

¹³ *Parsons v. Brown*, 15 Barb. 593.

¹⁴ *Macklot v. Dubreuil*, 9 Mo. 491.

always draws to it the constructive possession; and if the possession of the trespasser is interrupted, the possession of the real owner is renewed, and that without actual entry. The possession and the right go together until there is an actual possession adverse to the right. Neither actual residence on the soil, nor actual cultivation, or enclosure, is necessary; but there must be something tantamount to one or the other of these. No matter how long the real owner is out of actual possession, his title and his constructive possession remain until an actual hostile possession is taken. He may never have made an actual entry, or set his foot upon the soil; he is, nevertheless, by virtue of his title, in constructive possession. A wrong doer can derive no aid from title; he rests on possession alone; the law gives him no constructive possession. Actual occupancy, the *pedis positio*, is his only warrant.”¹⁵

And so, it is for the jury, under proper instruction, to determine from the number, character, and time of entries by the owner, whether they show a common or mixed possession, and whether the possession of an opposite party claiming by marked lines was exclusive, or casual and accidental;¹⁶ and, indeed, all circumstances having a bearing on the assertion of ownership, are for the jury;¹⁷ as whether an ecclesiastical corporation holds under a license, or adversely;¹⁸ and the time adverse possession has continued;¹⁹

¹⁵ *Cornelius v. Giberson*, 1 Dutch (N. J.) 31, and cases cited.

¹⁷ *Rivers v. Thompson*, 43 Ala. 641.

¹⁶ *O'Hara v. Richardson*, 46 Pa. St. 391.

¹⁸ *St. Peter's Church v. Beach*, 26 Conn. 365.

¹⁹ *Wiggins v. Halley*, 11 Ind. 8.

and whether an open and exclusive possession for thirty years was, in reality, adverse.²⁰

But, as in other matters, if the adverse possession is undisputed, it does not go to the jury.²¹ And it is for the court to say whether, when all the facts proved are true, they amount to an adverse possession.²²

Whether possession is exclusive is for the jury alone.²³ And continuous, where a holder leaves the premises for a special purpose, and is absent some months.²⁴

§ 175. Whether there has been an ouster of the heirs of a deceased co-tenant, where their ancestor died insolvent, and in debt to his co-tenants, and the survivors paid the taxes for nearly forty years, mortgaged the lands, erected buildings on it, and took the profits, is a question of fact.²⁵

§ 176. Whether a town was in possession during a certain period, is so likewise, under the following state of facts. In an action of ejectment, the plaintiff claimed by descent from her mother — the defendant by a deed from a certain town claiming that prior to the conveyance the town had held adversely for a specified time. During that period, however, the defendant claimed to have held possession by an agent put in charge of the property by her mother, and remaining in charge several years after the mother's death. By the account books of the agent (deceased), and

²⁰ *Eaton v. Jacobs*, 52 Me. 451.

²¹ *Bowie v. Brahe*, 3 Duer (N. Y.) 44.

²² *Paxson v. Bailey*, 17 Ga. 602.

²³ *Beverly v. Burke*, 9 Ga. 447, and cases cited.

²⁴ *Cunningham v. Patton*, 6 Barr. (Pa.) 358.

²⁵ *Keyser v. Evans*, 30 Pa. St. 509.

those of the town, it appeared that during the time in question the agent had accounted to the town for the rents, and paid them to the town. But the plaintiff thereupon offered evidence that her brother and joint-heir (deceased at the time of the action) was supported, during that period, by the town as a pauper, and thus the rents were paid in towards his support. The evidence was left to the jury to decide thereon whether the town was in actual possession.²⁶

§ 177. Whether the use of a right of way over lands belonging to a hotel, was permissive, or adverse, was held to be a question of fact, for the jury, under instructions, as to the nature of adverse possession; and how far it might exist when the use was that of a passage-way, over land attached to a public building, or one used for public purposes.²⁷

§ 178. Where the revolution of a mill-wheel, near a public highway, frightened horses passing along, and it was claimed that the continued use of the mill for thirty years had conferred a right to continue such use, it was held not a question of law, but of fact.²⁸

§ 179. Where the declarations of an occupant explain an enclosure and cultivation, tending to show that these are not adverse, it is for the jury to decide upon the real character of the possession.²⁹ And so, whether possession is merely colorable, or not, where a defendant in ejectment, took another upon the disputed land, rented it to him, but both came away together, after nailing up the cabin on the premises,

²⁶ *Gage v. Smith*, 27 Conn. 70.

²⁷ *Putnam v. Bowker*, 11 Cush. 545.

²⁸ *House v. Metcalf*, 27 Conn. 639.

²⁹ *Keener v. Kaufman*, 16 Md. 307.

and defendant charged the other not to disclose the transaction.³⁰ And whether defendants are actually in possession or only as trustees for a corporation.³¹

§ 180. Where a tenant in common conveys land of which he is in possession, with covenants of warranty against all claims and demands, and the grantee enters under his deed, his possession is adverse, as a legal conclusion; and is therefore for the court only.³²

§ 181. The sufficiency of acts of appropriate dominion, is, of course, for the jury.³³

§ 182. Where one acquires title to property by adverse possession, and consents to a deed of gift executed by the former owner, appointing trustees to the property for the use of the wife and children of the adverse possessor, whether his prescriptive title is thereby relinquished, is, it seems, a question of fact.³⁴

§ 183. Where, by the construction of a deed, the grant therein extends beyond the eaves, and to the walls of the grantor's house, and for the limitation period the water is allowed to drip from the eaves upon the granted land, it is for the jury to determine, it seems, whether the owner of the house thereby acquires a title by adverse enjoyment, or an easement, or no right at all, to the land under the eaves.³⁵ But this appears to be contrary to the general rule, as I judge.

³⁰ *Oliver v. Williams*, 25 Ga. 219.

³¹ *Lucas v. Johnson*, 8 Barb. 250.

³² *Manufac. Co. v. Pendergast*, 4 Foster (N. H.) 69.

³³ *Sharon v. Davidson*, 4 Nev. 419.

³⁴ *Lucas v. Daniels*, 34 Ala. 191.

³⁵ *Carbrey v. Willis*, 7 Allen (Mass.) 370.

CHAPTER XIV.

SALES AND DELIVERY.

§ 184. WHAT is a sale, and what is a delivery, is, of course, under the general principle, for the court to determine or define.¹ But whether a particular sale is completed or is executory, that is, to be fulfilled on some condition, or something remains to put the property in a condition to sell, is for the jury.² Whether an actual contract of sale has taken place or not, and if so, what its particular terms are,—an agreement for a future purchase, or a completed sale, but liable to be rescinded on conditions, &c.,—are always questions of fact. But where the existence and terms of a contract have been established, the construction of the contract is matter of law.³

§ 185. Whether property levied upon has been properly sold, is a question of law.⁴ But where a statute exempts "all such provisions as may be on hand for family use," it is for the jury to determine whether the whole of a lot of produce which the defendant had on hand at the time of the levy was needed for family use.⁵

¹ Clarke's Adm'r *v.* Marriott's Adm'r, 9 Gill (Md.) 336. *v.* McKnight, 13 Johns (N. Y.) 295.

² McClurg *v.* Kelley, 21 Iowa, 512. ⁴ Bevan *v.* Byrd, 3 Jones L. (N. C.) 397; Young *v.* Smith, 10 B. Mon. (Ky.) 294.

³ Smalley *v.* Hendrickson, 5 Dutch (N. J.) 373; De Ridder ⁵ Atkinson *v.* Gatcher, 23 Ark. 102.

§ 186. It has been held that the payment of counterfeit money for goods sold does not, in Pennsylvania, divest the title of the owner, except as against a subsequent purchaser, in good faith, for value. And in replevin for a horse which had been thus paid for, and sold on the street afterwards, by the fraudulent purchaser, at an exceedingly low price, it was left to the jury whether, on all the circumstances of the case, the second purchaser was a *bona fide* purchaser for value.⁶

§ 187. Whether a sale of chattels in part payment of a debt, and a transfer of notes at the same time, as collateral security for the same debt, were parts of the same transaction, or separate transactions, has been held a question of fact. And also whether a sale in such a transaction is honest or not.⁷ And whether the title of a dissenting partner passed in the sale of partnership property.⁸

§ 188. Where two persons jointly purchase land, under specific articles of agreement, and one of them pays part of the purchase price, but with money furnished by the other, and then assigns his interest to the other, who completes the payments, it is held to be for the jury to decide whether the latter was the real purchaser, or it was really a joint purchase.⁹

§ 189. Where one assigned to his creditor his interest in an agreement with the creditor for the purchase of land, and yet remained in possession of the land, and it did not appear that any part of the debt

⁶ *Green v. Humphrey*, 50 Pa. St. 215.

⁷ *Keen v. Preston*, 24 Ind. 397.

⁸ *Stage Co. v. Walker*, 2 Clarke (Iowa) 515.

⁹ *Crow v. Crow*, 29 Pa. St. 218.

was paid by the assignment, and afterwards a judgment by a third party was obtained against the assignor of the contract, and the equitable interest of the latter bid in under the judgment at an execution sale, and ejectment was brought against the assignee's vendee, who claimed under the assignment as an absolute conveyance, while, on the trial of the ejectment, the defendants contended that it was not an absolute conveyance, but only a security for the repayment of money advanced, the court below declared it absolute, and refused to submit the question to the jury—it was held, on error, that in the absence of any express agreement, the assignment should be held as a mere security, yet whether it was an absolute conveyance or a mortgage depended upon circumstances; and where the assignment was without consideration, no money, nor any part of the assignor's indebtedness, being paid thereon, and there was evidence that the assignor remained in possession after the assignment, and of the assignee's declaration that the assignment was not absolute, there was sufficient evidence to justify a submission to the jury, to find whether it was not intended as a security; and the refusal of the court to so submit the question was error.¹⁰

§ 190. A debtor is allowed, when in failing circumstances, to make an assignment for the benefit of his creditors, in a fair and equal manner; and the question of fairness in the transaction is a question of fact.¹¹

§ 191. The defendants, having invented a stocking-

¹⁰ *Rhines v. Baird*, 41 Pa. St. 256.

¹¹ *Wilson v. Pearson*, 20 Ill. 87.

loom, and obtained a patent for it from the United States, sold the plaintiffs, for a consideration, half the right to all territory without the United States, on a covenant with the plaintiffs that they (the plaintiffs) should, as soon as practicable, send an agent to Europe, to exhibit the invention and sell the machines, and sell also the right to make, use, and vend the same without the United States; that the plaintiffs and their agent should use due exertion in selling to the best advantage the machines and the rights; and that if, on such reasonable efforts, they should not succeed in selling to the amount of one thousand dollars above the expenses of the agency, then the defendants would repay them the one thousand dollars purchase money, together with the agent's expenses, or convey to the plaintiffs one half of the right within the United States. So the plaintiffs sent their agent to Europe, who contracted with Brettle & Co., in London, "to proceed forthwith to Scotland for the purpose of consulting engineers, or men of science, skilled in the construction of machinery, and by all needful experiments, additions, and alterations, to improve the machine, so as to make a perfect stocking by means of steam power, and then return and deliver it to the said Brettle & Co., and leave it in their possession for two months, during which they could have the option of purchasing it at £15,000." Action of covenant was brought for the one thousand dollars and expenses, wherein an issue of fact arose whether the defendants had been notified by the plaintiffs of the failure to make sales, as specified in the agreement, within a reasonable time. And the judge instructed

the jury that the Brettle covenant was not properly within the scope of the agency, and could avail nothing unless it had been referred to the defendants for their assent. This was held to be error; and it was held that the question should have been submitted entire to the jury, whether, in all the efforts that had been made by the agent, he was, or was not, using reasonable and proper efforts to effect sales of the machines and right, as stipulated by the covenant.¹²

§ 192. When the words "more or less" are employed in a contract, as to quantity, it is for the court to say whether there has been a substantial compliance with the contract in the delivery; as, for example, where the words were used in a broker's note for the sale of goods thus, "Sold to N. W. for account of S. C. five hundred bundles, more or less, gunny bags;" which goods were sold for the purpose of filling a ship. On delivery there was a deficiency of twenty-five bundles. The court held that there was no latent ambiguity authorizing parol evidence to show an understanding between the parties as to whether there was to be more or less than the five hundred.¹³

§ 193. The validity of an order of sale by an Orphans' Court is a question of law, and must be determined from the record alone, without evidence *aliunde*.¹⁴

§ 194. Delivery and acceptance are questions for the jury. Thus, where, in an action of trespass for

¹² Watson v. Walker, 33 N. H.
¹³ Cabot v. Winsor, 1 Allen, 546.

¹⁴ Wyatt's Adm'r v. Steele,
26 Ala. 639.

carrying away the plaintiff's lumber, the defendant justified as an officer attaching the lumber as the property of a third party, it appeared that some lumber had been purchased of this third party by the plaintiff, and a portion of it delivered and used, and another portion had been marked by the plaintiff before the attachment. It was held to be for the jury to determine whether the lumber had been delivered to, and accepted by, the plaintiff, according to the original contract, and the intention of the parties, or whether the contract was still incomplete, the lumber not having been measured, nor the amount ascertained, before the attachment was levied.¹⁵

§ 195. But constructive delivery is a mixed question of law and fact; as where wheat was shipped on consignment, and on arrival was mixed with other wheat in the elevator, and the receipts for it made it deliverable to consignees, or order, and the shipper sold the wheat, and received payment, and gave an order on the consignee for the delivery, but, before the purchaser found the consignee, the elevator was burned, and the wheat destroyed, it was held no delivery, — so that the purchase money could be recovered back, — and that, as a mixed question of law and fact, it should have been left to the jury, under the instructions of the court.¹⁶

§ 196. Whether, by a bill of sale, the vendor intended to vest immediate title in the vendee, and whether there was a delivery to, and a subsequent possession by, the vendee, are for the jury, under instructions.¹⁷

¹⁵ *Kelsea v. Haines*, 41 N. H. 247.

¹⁶ *Perkins v. Dacon*, 13 Mich. 90.

¹⁷ *Adm'r v. Hock*, 47 Mo. 330.

§ 197. Where the evidence of a delivery under the statute of frauds is so slight that the court would set aside a verdict sustaining such delivery, it is the duty of the court to withdraw the question from the jury.¹⁸

§ 198. Where, in a purchase of land, there is also a purchase of personal property thereon, and the purchaser receives a conveyance for the land, the question whether the vendee had actual possession of the land is important in determining whether there was an actual delivery of the personal property.¹⁹

§ 199. A removal of the goods from a building in which they are assigned by a voluntary assignment, is not necessary to pass the title; and herein whether they have been delivered or not, is a question of fact.²⁰

And, in general, replevin may be maintained where it is understood and intended that the title to the property should pass without any further act of the parties.²¹

§ 200. Where the price of a table was sued for, which was to be manufactured and delivered on a wharf for shipment, and when notified that it was ready, the defendants said they would give the maker notice when they had a vessel to receive it, having refused a proposal of the manufacturer that he should dispose of it otherwise, who accordingly held it for shipment by the defendants until it was burned in his custody, it was held to be for the jury to decide whether, at the time of the fire, the table had become

¹⁸ *Denny v. Williams*, 5 Allen, 1.

¹⁹ *Cahoon v. Marshall*, 25 Cal. 200.

²⁰ *Hall v. Wheeler*, 13 Ind. 372.

²¹ *Rhea v. Riner*, 21 Ill. 531.

the property of the defendants, and was on storage for them; although it was in evidence that he was also to take it to the wharf when they were ready to ship it.²²

§ 201. In the sale of labor, as where a house was built, but not so well as the contract required, but the defendant (the owner) took possession, it was held that the workman was entitled to receive *quantum meruit*, though not the contract price, it being thus accepted.²³

§ 202. Where a railroad company engaged to deliver the plaintiff's baggage to a cab at the station, it was held to be for the jury to determine whether the plaintiff had accepted a delivery on the platform or elsewhere, in lieu of that in the contract.²⁴

CHAPTER XV.

PROMISSORY NOTES — PAYMENT, AND USURY.

§ 203. WHETHER a promissory note is property or only collateral security, where two are jointly indebted, and one of them indorses to the other, so as to provide for his share of the debt, the note of a third party, and afterwards pays the other also a sum of money sufficient with the note to pay his share of the

²² Weld v. Carne, 98 Mass. 154.

²³ Becker v. Hecker, 9 Ind. 499.

²⁴ Butcher v. R. R. Co. 29 Eng. L. & E. 347.

joint debt, and the indorsee of the note paid the joint debt, is for the jury; and in such a case it was held that the jury might find the indorsed note to be property, and not collateral security in the hands of the indorsee, although he did not expressly agree to discharge so much of the indorser's part of the joint debt in return.¹

§ 204. And where evidence leaves it doubtful whether the signer of a note is a principal debtor, or only a surety, the determination is with the jury.²

§ 205. A promissory note, on account, perhaps, of its brevity of form, is an exception to the general rule that alterations are presumed to have been made at or before signing. And if the date, for example, seems to have been altered, it cannot go to the jury until the holder explains the alteration; because it is held that the maker of negotiable paper is reasonably supposed to have issued it clear of all blemishes, either in the date or the body of the instrument, so that if it is defective when issued, it devolves the burden of explanation and proof upon the holder, and that, too, even if the alteration is beneficial to the maker; and it is for the jury to say whether the alteration was made before or after the note was negotiated.³

§ 206. In an action on book account for goods sold and delivered, and also on a promissory note, it is for the jury to say whether these are for the identical

¹ *Rice v. Porter*, 17 N. H. 135.

³ *Heffner v. Wemich*, 32 Pa

² *Wyley v. Stanford*, 22 Ga. St. 425.

goods, or whether the note is based on a distinct and independent consideration.⁴

§ 207. Where, in an action on a promissory note, the defendants produce evidence tending to prove the note to be without consideration, the question goes to the jury with the evidence on both sides; and it was held erroneous to charge "that the plaintiff, having been notified that proof of the consideration of the notes in suit would be required on the trial, was bound, under the circumstances of this case, to make such proof; and if she has failed to prove, to the satisfaction of the jury, a valuable consideration for such notes, or either of them, she cannot recover thereon;" the court remarking, "The error in this point is, in not looking at the whole case, on both sides; for the consideration might have been proved on the defendant's evidence, and therefore independent of the generality of the expression 'under the circumstances of this case,' which is clearly objectionable, it would have been erroneous to put the proposition in such language as would have led the jury to believe they were to look only to the proof on the part of the plaintiff, for the evidence of such failure, if any there was."⁵ I think, moreover, the general rule is, that the burden of proof is upon the party impeaching the consideration of a note.

§ 208. A corporation cannot become a surety, as an accommodation indorser, or in any other form, unless the note has been discounted in good faith, on representations by the officers that it was the note of

⁴ *Heffner v. Wemich*, 32 Pa. St. 427.

⁵ *Swain v. Etling*, 32 Pa. St. 491.

the corporation, or unless the note is in the hands of a *bona fide* holder for value without notice. And where suit was brought against a corporation, as indorser, a conflict arose as to whether the indorsement was for the accommodation of a third party, or was discounted for the defendant by the plaintiff; and, if the former, whether it was discounted by the plaintiff on representations made by the officers that it was the note of the corporation, received by them in the ordinary course of business; and it was held that these questions were for the jury, and that it was error for the judge to decide that the plaintiff was a *bona fide* holder, and direct a verdict for him.⁶

§ 209. Where a note is payable in current bank notes, it is for the jury to determine the value of the bank notes on the day of payment.⁷

§ 210. And where bank notes are destroyed, their value may be recovered from the bank. And where notes issued by a bank were sent to it by express, and a part was stolen on the way by an express agent, who destroyed the bills he had taken, after the amount had been paid by the company to the bank, it was held that the property in the bills was transferred to the company by the payment to the bank, and that their subsequent destruction entitled the company to recover the whole amount from the bank, and that the nature and character of the evidence pertaining to the destruction was for the jury.⁸

§ 211. Where, on an assignment, an answer to a

⁶ Bank v. Empire Stone Dressing Co. 30 Barb. 423.

⁸ Bank v. Express Co. 45 Pa. St. 427.

⁷ Williamson v. McGinnis, 11 B. Mon. 76.

petition denies none of the facts fixing the liability of an indorser, or as an assignor for value, but only denies that the plaintiff was the holder and owner of the note, and alleges that the note had been assigned to another, and the objection is without proof, the court should decide the merits of the controversy without a jury.⁹

§ 212. Whether there was any agreement to discharge an indorser where he induced the holders to sue the maker, and, pending the action, the plaintiff's attorneys, with the assent of the indorser, took from the maker a part payment, and a note for the residue, on a written stipulation that proceedings should be stayed, but if the new note was not paid at maturity, judgment should be entered in the action pending, and thereupon surrendered the original note, saying nothing about releasing the indorser, is for the court to determine; and it is held, under such circumstances, that the attorneys having explained that the surrender of the original note was made inadvertently, there was no agreement to discharge the indorser.¹⁰

§ 213. And the regularity and legality of proceedings in protest and notice of dishonor are for the court to determine.¹¹

§ 214. A receipt may be inquired into in a court of law or equity; and where it bears date subsequent to the date of a note, and purports to be in full on a final settlement between the parties, whether it includes the note or not is for the jury; and even where

⁹ *Van Buskirk v. Levy*, 3 Met. (Ky.) 135.

¹⁰ *Bank v. Kennedy*, 9 Bosw. (N. Y.) 545.

¹¹ *Watson v. Larpley*, 18 How. 517.

the note is signed by a firm, and the receipt is given in the proper name of one of the members of the firm.¹²

§ 215. Where it was claimed that notes were renewals of former notes, and these of others still prior, and back in a continued series, all for the same debt, to a period before the entry of a lien creditor's judgment, who has precedence over a mortgage to a bank, the question of renewals was left to the jury; and this was held correct, on appeal.¹³

§ 216. On a feigned issue to try whether a judgment has been paid or not, the question of payment is one for the jury.¹⁴

§ 217. Whether notes were received in payment on an account, where the defendant had delivered to the plaintiffs three promissory notes of third persons, payable in metal, and there was no proof that the plaintiffs had agreed to take the notes in payment, or assume the duty of collecting them, and the plaintiffs maintained that they were not really left with them as collateral security even, but only for the defendant's convenience that the metal in which they were payable might be received by them, and credited on the account, and while the notes were unpaid the makers failed, belongs to the jury to decide; and it was held error in the court to instruct the jury that "under the facts in evidence, assuming their truth," the opinion of the court was that the amount of the notes ought to be credited, and to direct their verdict accordingly.¹⁵

¹² *Burton v. Merrick*, 31 Ark. 360.

¹³ *Bank of Commerce* 44 Pa. St. 423.

¹⁴ *Horner v. Hower*, 49 Pa. St. 477.

¹⁵ *Sellers v. Jones*, 22 Pa. St. 425.

And where, on an issue to ascertain how much was due on a cautionary judgment, a question was submitted to the jury whether, on a settlement between the plaintiff and defendant, where a note was given by the latter to the former, the note was received in satisfaction of the judgment; — held, not error.¹⁶

And where one party sued another, and a third person gave his note to the plaintiff, to settle the suit; whether this note discharged the debtor by a novation, was held for the jury.¹⁷ Also, whether the taking of the note of an individual partner was taken as collateral security only, or as an extinguishment of the partnership debt.¹⁸

In general terms, it is held that whether a note or bond is accepted in satisfaction of an original claim, is for the jury; and that where claims transferred to a creditor consist of the indebtedness of others, and there is no agreement to receive them in satisfaction, they are to be regarded as collateral security for the original debt.¹⁹ But that agreement may be implied; as where three partners were sued on an account, and it appeared that two of the three had given the plaintiff their note for the account, and the action was dismissed as to them, and maintained as against the third, it was held to be for the jury to say whether the note of the two was received in extinguishment of the debt of the three; as, if so, the third would be discharged of the debt.²⁰

¹⁶ *Schilling v. Durst*, 42 Pa. St. 130.

¹⁷ *Wilson v. Hanson*, 20 N. H. 378.

¹⁸ *Bennell v. Chamberlin*, 26 Conn. 487.

¹⁹ *Stone v. Miller*, 16 Pa. St. 456, and cases cited.

²⁰ *Keerl v. Bridgers*, 10 S. & M. (Miss.) 614.

Even an account against a stranger may be delivered and accepted, in New York, in satisfaction of an account or note; and it is for the jury to decide upon.²¹

And where parties are indebted to a bank, and execute their note for the claim, not payable to the bank itself directly, but to one of the officers of the bank, whether it was to operate as an extinguishment of the debt by novation, and thus bar the action on the original contract, is for the jury, under instruction that it could not have this effect except on agreement.²²

§ 218. But whether evidence proves a payment in law is for the court. As where three persons executed a note to three payees, and one of the payees sold the note after it was due, receiving the principal, and afterwards two of the payees indorsed it. The third knew nothing of the transaction, and after the sale received two hundred dollars on it from one of the makers. Afterwards the indorsee (defendant) sold the note to the plaintiff, and received payment for it. When the note was paid to the plaintiff, he was compelled to allow the two hundred dollars, for which he sued the defendant, whose liability turned upon the point whether this was a legal payment, — the plaintiff having been, before purchase, told that the two hundred dollars were paid on the note.²³

§ 219. Where, in case of a suit pending against an indorser, on a negotiable note indorsed in blank, a third party paid the plaintiff the amount of the note, and assumed the prosecution of the suit, — the ar-

²¹ *Willard v. Germer*, 1 Sandf. (N. Y.) 52.

²³ *Frost v. Martin*, 9 Foster 315.

²² *Lyman v. U. S. Bank*, 12 How. 239.

range ment being made on his own responsibility, and the note paid for with his own funds, but in reality for the benefit of another indorser, who desired a judgment to be rendered against the defendant,—the latter claimed the transaction to be either a payment of the note by this other indorser, or a transfer of the legal title of the note to the purchaser, and that this was a question of law for the court. On the other hand, it was claimed to be only an executory contract for the purchase of the judgment that should be recovered on the note. It was submitted to the jury, under the instruction that if the note had been paid by the other indorser, or actually purchased by him who had paid the amount to the plaintiff, the plaintiff could not recover; but that, if the transaction was only an executory contract for the judgment to be recovered, he could recover. It was held that the submission to the jury, and the instruction, were correct.²⁴

§ 220. It is a question of fact whether there is an agreement to extend the time of payment, where a bill or note, having time to run, is received from the maker of a bill or note overdue, or whether this is only collateral to the overdue note.²⁵

§ 221. And also whether an order on another person is taken as payment when the amount is collected; or merely for collection.²⁶ And whether stock payments were upon a certain subscription sued on, or upon a new issue of railroad stock.²⁷ And whether there has been part payment, on a proper application

²⁴ Comstock v. Savage, 27 Conn. 184.

²⁵ Taylor v. Allen, 36 Barb. 297.

²⁶ Stevens v. Thornton, 26 Ill. 328.

²⁷ R. R. Co. v. Cavett, 12 Ind. 316.

thereof, on a mortgage debt.²⁸ And whether the acceptance of a promissory note of a third person was voluntary, or was compulsion forced upon the creditor by necessity, when nothing else could be obtained.²⁹ In the former case, the transaction will support the defence of payment, but not in the latter.

§ 222. Whether a payment was voluntary, made after the return day of an execution quashed on motion upon the ground of the defendant's discharge in bankruptcy, or was made under a mistake of the party as to his rights under the bankruptcy, is for the jury also.³⁰

§ 223. Where an appraisement was had, under an order of the Orphans' Court for the partition of lands, and one heir accepted one portion at the appraisement, and entered into a recognizance for the payment of the other heirs their proportional shares, on which recognizance suit was brought, and part payment pleaded, in this that, under order of the Orphans' Court, a trustee had sold one of the other divisions or portions, and all the proceeds, after paying the debts of the intestate, were paid to the plaintiff, it was held to be for the jury to say whether this was received as part payment.³¹

§ 224. Whom money was held for, under the following circumstances, was held for the jury to decide, —namely: A debtor, unable to pay, agreed with the defendants that they should discount bills to be drawn by him and accepted by his creditors; who handed

²⁸ *Barnes v. Brown*, 69 N. C. 439.

³⁰ *Ewing v. Peck*, 26 Ala. 415.

³¹ *Kidd v. Commonwealth*, 16

²⁹ *Bank v. Smiser*, 1 Sneed Pa. St. 426. (Tenn.) 501.

the acceptances to the defendants. The defendants' agent asked them when they required payment, and they replied next day; but afterwards desired the payment of part that same evening. The agent replied that he would not give the check to the plaintiffs, but to the debtor's clerk, and that he should require the debtor's order for the balance. The debtor's clerk received the check, and handed it to the plaintiffs, and on the same evening the plaintiffs handed the defendants an order by the debtor for the payment of the balance to the plaintiffs. It was held a question of fact whether, from the time of lodging the order, the defendants held the money for the debtor or the plaintiffs.³²

§ 225. Where payment is to be made in "cash notes," the jury are to decide what is the meaning of these terms, and what is the value of the thing meant.³³

§ 226. Agreement of payment on a release, also as follows, namely: Money was promised to be paid for a release of plaintiff's interest in land, and the evidence tended to prove that the defendant promised to pay one hundred dollars down, and an additional amount when he "could get rid" of a mortgagee of the plaintiff by the surrender of a mortgage previously agreed upon. In the release, the plaintiff covenanted to warrant and defend the land from all encumbrances made by him. Before this, the mortgagee entered to foreclose for breach, and in less than three years from the entry the release was executed, the defendant took possession under it, and occupied after the ex-

³² *Noble v. Discount Co.* 5
Murl. & Nor. 224.

³³ *Ward v. Latimer*, 2 Tex.
248.

piration of the three years prescribed by the statute had elapsed,—the mortgagee absconding, and thus abandoning his suit. It was held that it was for the jury to decide whether the defendant agreed to pay one hundred dollars down for the release, under instruction that, if so, plaintiff could recover that amount, and no more; and that defendant could not avail himself of his covenant in the release,³⁴ the mortgagee's claim not yet being relinquished, or "got finally rid of," the balance of the money for the release was not due, and as the suit seemed abandoned by the mortgagee's disappearance, the covenant was not yet completely broken, and so these are, it appears, the grounds of the two branches of the ruling in the case.

§ 227. When the relation between parties is of a business character only, then proof of payments and expenditures by one for the use of another creates a presumption that these are in discharge of indebtedness; but when money is paid by a father for his son, it is otherwise; and whether money paid is intended for a payment or a gratuity is for the jury to determine, from all the circumstances.³⁵

§ 228. An obligation to convey lands, independent on the face thereof, may be shown by parol evidence to be really dependent upon the payment of a note for the purchase money, although neither the note nor the bond refers to the other, or are, apparently, in any wise connected; and the determination of the matter

³⁴ *Bartlett v. Tarbell*, 12 Allen, 123.

³⁵ *Swain v. Etling*, 32 Pa. St. 492.

is with the jury.³⁶ And, on the same principle, set-offs are matters of fact.³⁷

§ 229. In an action for damages or compensation against a railroad company, it is held to be for the court, and not for the jury, to decide whether an offer for land over which the company desired to pass was by way of compromise, to avoid legal proceedings, or not.³⁸

§ 230. A note payable "six after date" is held not void for uncertainty. And although it is a patent ambiguity, and so not explainable by parol evidence, yet it is held that from the paper itself, viewed in the light of the circumstances under which it was given, the intention of the parties may be inferred. But it is also held, that whether the intended time of payment is to be decided by the court or the jury, is a doubtful point.³⁹

§ 231. As to presumption of payment, it, in general, belongs to the jury: as where a vendor sued to recover land sold by him ten years before, and produced a note executed by the vendee at that time for part of the purchase money, the vendor having given a bond to convey on the payment of the note, it was held error to instruct the jury that the production of the note repelled the presumption of payment arising from lapse of time; because such lapse of time was a circumstance to prove payment, notwithstanding the production of the note, and the matter should have

³⁶ *Younger v. Welch*, 22 Tex. 425.

³⁷ *Hudson v. Weir*, 29 Ala. 298.

³⁸ *Davis v. R. R.*, 11 Cush. 509.

³⁹ *Nichols v. Frothingham*, 45 Me. 225.

been left to the jury.⁴⁰ But I doubt if this is in accord with the general rule.

If, from lapse of time, the presumption has arisen of payment on a contract, and a deed given in pursuance thereof, it is for the jury to decide; although it may be withdrawn from them, where the weight of evidence is decisive; so that, had the jury decided against the giving of the deed, a new trial would have been granted.⁴¹

What will repel a presumption of payment is sometimes for the court; as where, in reply to such presumption arising from the lapse of eleven years, it appeared that for seven years of that time the defendant had been wholly insolvent, and it was held that the presumption did not arise in such case.⁴²

But usually, any facts and circumstances which tend to repel the presumption of payment, are to be considered by the jury.⁴³ And it has even been held, that a demand of payment, in 1843, of a note bearing date in 1827, the parties to which are brothers, and on which suit was brought in 1854, was sufficient to repel presumption of payment, and was for the jury to decide.⁴⁴ But, it seems, if the defendant himself proves such facts as repel the presumption, he cannot require the court to submit them to the jury. And it is held sufficient to repel the presumption of payment of ground rent, arising from lapse of time, that the

⁴⁰ *Walker v. Emerson*, 20 Tex. 709.

⁴³ *Grantham v. Canaan*, 38 N. H. 270.

⁴¹ *Brotherson v. Jones, Hill & Denio* (N. Y.) 173.

⁴⁴ *Waters v. Waters*, 1 Met. 519.

⁴² *Woodbury v. Taylor*, 3 Jones L. (N. C.) 506.

parties under whom the defendant claims title entered into a written agreement to pay no more ground rent under the plaintiff's title, and to assist each other in maintaining resistance; and had, accordingly, resisted the collection.⁴⁵

Where mortgage securities are not subject to the statute of limitations, twenty years after due has been held to create a legal presumption of payment; but whether that presumption is repelled by proof is a question of fact.⁴⁶

Where there is evidence of payment, and records of proceedings are shown to contradict presumption of payment from lapse of time, the whole goes to the jury.⁴⁷ And where there are circumstances sufficiently accounting for the creditor's delay.⁴⁸

Where rent became due, and, the day following, the lessee entered into a written contract with his lessor for a surrender of the unexpired term, in consideration of which, and other stipulations, the lessor agreed to pay, and actually did afterwards pay, a very much larger sum than the rent in arrear, it was held, (1.) That the transaction did not extinguish the rent due. (2.) That from the contract and the payment thereon, no legal presumption arose either that the rent in arrear had been paid, or relinquished by the lessor. (3.) That these facts were properly left to the jury, with instructions that it was a question of fact for them whether, in connection with the entire

⁴⁵ *McQuesney v. Heister*, 33 Pa. St. 435.

⁴⁶ *Jay v. Adams*, 26 Me. 333.

⁴⁷ *Levers v. Van Buskirk*, 4 Pa. St. 313.

⁴⁸ *Reed v. Reed*, 46 Pa. St. 242.

transaction, they did or did not warrant a presumption of the payment of the rent.⁴⁹

§ 232. On direct evidence, it is a question of law whether a contract is or is not usurious.⁵⁰ But where there was no direct evidence that, at the time of a loan, a usurious agreement was made, but it was shown that, twenty-two days afterwards, the borrower paid and the lender received, for the use of the money from the time of the loan until the payment, a much greater sum than the interest at seven per cent., it was held to be for the jury to decide whether the loan was made upon a usurious agreement.⁵¹

Where one was asked to discount an accommodation note, but replied that he had no money, and then, being asked to procure a discount on it, took it, indorsed it, and got it discounted by the plaintiffs, at lawful interest, and the plaintiffs credited him with the amount, but in paying over the proceeds to the first, he retained a large percentage, it was held that the jury were warranted by the facts in finding that there was no usury,—a part of the sum retained being regarded as a commission for procuring the discount.⁵²

It is held that negotiable paper may be sold for less than its face without usury, and the whole amount be collected of the maker, at maturity. And whether the transaction is in good faith, or only a subterfuge

⁴⁹ *Sperry v. Miller*, 16 N. Y. 412, 413.

⁵⁰ *Belden v. Gray*, 5 Florida, 504.

⁵¹ *Catlin v. Gunter*, 1 Kernan (N. Y.) 371.

⁵² *Bank v. Betts*, 9 Bosw. (N. Y.) 552.

to cover usury, is a question for the jury.⁵³ Also, where the premium of exchange charged on the sale of a draft is unreasonable or exorbitant, whether the transaction is a cover for usury.⁵⁴

But there must always be some evidence tending to show usury, before the question goes to the jury; since *prima facie* a transaction is *bona fide*; and it is held that the test whether the transfer of a note by the payee to the holder at more than the legal rate of interest, is a sale or a usurious loan, is, whether it was a perfect and available note in the hands of the payee at the time of the transfer, upon which, when due, he could have maintained an action against the maker.⁵⁵

Where A knew B to have a number of bills of a bank of another state, not bankable in New York city, being subject there to a discount, but passing at par in ordinary business, and applied for a loan of them amounting to \$5000, offering for the loan his notes, payable every ninety days, in New York, and to give security thereon, stating that he wanted the money to use elsewhere, and the bank bills would answer his purpose, the money was obtained thus on legal interest, and notes given without anything being said about interest by either party. A used the greater portion of the bills in his business. Held, in an action on two of the promissory notes, that, although both parties knew the bills were at a discount in New

⁵³ *Mix v. Insurance Co.* 11 Ind. 117, and cases cited.

⁵⁵ *Williams v. Reynolds*, 10 Md. 66.

⁵⁴ *Cuyler v. Sanford*, 8 Barb. (N. Y.) 232.

York, the transaction was not, of necessity, usurious; and that if B did purposely make the arrangement, and thereby realized more than seven per cent., but without actual usurious interest, the transaction was not thereby rendered usurious *per se*; and that, whether the agreement for the loan was in fact, and in intention, corrupt and usurious, was a question of fact, which ought to have been submitted to the jury.⁵⁶

Where it was alleged that a note was in form given for a pretended interest of the payee in real estate, which interest had ceased to exist, but that, in fact, it was given for a usurious loan of money, — there being evidence tending to prove these allegations, which the plaintiff denied, — it was held proper to refer this question to the jury, and not direct a verdict. Also held correct for the judge to instruct the jury that if, at the time of the loan for which the note was given, the plaintiff had made up his mind not to take the land interest of the payee, and that the makers understood this, and instead of the transaction being a real bargain and sale, the proceedings were merely a resort of the parties as a cover of a usurious loan, the whole transaction would be usurious and void, it being a question of fact what was the intention of the parties, and what the real transaction.⁵⁷

Where the transfer of a note at a rate of interest usurious in the state of the parties' residence, is made in another state, the transaction is not necessarily an

⁵⁶ Robbins v. Dillaye, 33 Barb. 79.

⁵⁷ Ayrault v. Chamberlain, 33 Barb. 236.

attempt to evade the usury laws. This is a question for the jury.⁵⁸

Whether a discounter was an agent or broker of the maker, or was himself the taker, cannot be referred to the jury, unless there is evidence tending to show such agency or brokerage. In a case where this was done, it was held error; and the case was remanded.⁵⁹

A paper executed by the payee at the time of transferring a note is admissible to prove usury, although not sufficient, of itself, to do so; and it is for the jury to determine its effect.⁶⁰

CHAPTER XVI.

INSURANCE.

§ 233. WHETHER one who has erected a building on land which he does not own has an insurable interest therein, is a question for the jury.¹

§ 234. Likewise, whether there have been material misrepresentations made by the insured in obtaining a policy, unless those representations are warranties, when it is held they are to be so construed, and by the court;² so that it was error to submit the question to the jury whether the particulars in which, at the

⁵⁸ *Durant v. Banta*, 3 Dutch (N. J.) 637.

⁵⁹ *White v. Stillman*, 25 N. Y. 543.

⁶⁰ *Tucker v. Wilamowicz*, 3 Eng. (Ark.) 157.

¹ *Mitchell v. Insurance Co.* 32 Iowa, 426.

² *Le Roy v. Insurance Co.* 39 N. Y. 92. (Miller, J., dissenting.)

time when the policy was made, the premises did not correspond with the description, did, or did not, increase the risk.³

But when the policy does not expressly make the representations a part of itself, even if they are to be held to be warranties, and the survey was signed by the plaintiff and received by the agent as a private memorandum, and was not presented until after the policy had been delivered without conditions regarding the survey, it has been held a question for the jury; and also, in connection therewith, whether certain acts or omissions increased the risk.⁴

Even an immaterial misrepresentation in a survey or application made a part of the policy, has been held to discharge the liability of the company. Thus where an answer to a question in an application for insurance on a factory, namely, "Is there a watchman in the mill during the night?" was, "There is a watchman nights," but it appeared that on Sunday nights there was no watchman, the court held there was a fatal breach, since the answer would properly be construed that there was a watchman every night; and that it would not be amended by proof of a custom in that section of the country not to keep a watch from twelve o'clock Saturday night until the same time Sunday night. The exception should have been clearly stated, and so the effect of the breach was to annul the policy without regard to the materiality of the warranty, or whether the breach had anything to do in producing the loss. And the rule is quoted

³ *Le Roy v. Insurance Co.* 39 N. Y. 92. (Miller, J., dissenting.)
⁴ *Le Roy v. Insurance Co.* Ibid, 57.

from Marshall on Insurance, "A warranty being in the nature of a condition precedent, and therefore to be performed by the insured before he can demand performance of the contract on the part of the insurer, it is quite immaterial for what purpose, or with what view it is made, or whether the insured had any view at all in making it. But being once inserted in the policy, it becomes a binding condition on the insured, and unless he can show it has been literally performed, he can derive no benefit from the policy. The very meaning of a warranty is to preclude all question whether it has been substantially complied with, or not. If it be affirmative, it must be literally true; if promissory, it must be strictly performed."⁵

But where the warranty relates not to a fact so much as to a description of the building insured, the rule is relaxed, and substantial correctness is admitted, which is to be judged by the jury, as to whether there is a material variation or not.⁶

And a warranty may be limited also in its express terms, as where the language is, that the insured covenants and agrees to and with the said company, that the foregoing is a just, full, and true exposition of all the facts and circumstances, in regard to the condition, situation, value, and risk of the property to be insured, so far as the same are known to the applicant, and are material to the risk.⁷ And in all cases except those of absolute warranty, the question of materiality is for the jury.⁸ And where the limiting

⁵ *Ripley v. Insurance Co.* 30 N. Y. 157, and authorities cited.

⁷ *Garcelon v. Insurance Co.* 50 Me. 582.

⁶ *Tessin v. Insurance Co.* 30 Mo. 38, and cases cited.

⁸ *Mutual Insurance Co. v. Deale*, 18 Md. 50.

clause quoted above is employed, it seems that if an answer to a question as to the "relative situation of other buildings" specified two buildings "with fifty feet," the court will construe it to mean "within fifty feet," and construe the answer to be sufficient, even if one of the buildings stands within two feet.⁹

A concealment, as well as a positive misrepresentation, comes within the province of the jury.¹⁰ The distinction is thus stated: "Misrepresentation is the statement of something as fact which is untrue in fact, and which the assured states, knowing it to be not true, with an intent to deceive the underwriter; or which he states positively as true without knowing it to be true, and which has a tendency to mislead, such fact, in either case, being material to the risk. Concealment is the designed and intentional withholding of any fact material to the risk, which the assured, in honesty and good faith, ought to communicate to the underwriter; mere silence on the part of the assured, especially as to some matter of fact which he does not consider it important for the underwriter to know, is not to be considered as such concealment. *Aliud est celare, aliud tacere*. And every such fact, untruly asserted or wrongfully suppressed, must be regarded as material, the knowledge or ignorance of which would materially influence the judgment of the underwriter in making the contract at all, or in estimating the degree and character of the risk, or in fixing the rate of the premium. If the

⁹ *Allen v. Insurance Co.* 5 Gray, 389.

¹⁰ *Clark v. Insurance Co.* 40 N. H. 338, and cases cited.

fact so untruly stated, or purposely suppressed, is not of this character, it is not a misrepresentation, or concealment, within this clause of the conditions annexed to the policy.”¹¹

If there be an apparent conflict between the representation and facts corresponding, and the by-laws of the company, the former will prevail; and, as usual, the materiality of the variance will be for the jury, and determined on the ordinary grounds. And where an application on a stock of goods represented that the stock all consisted of “goods usually kept in a country store,” and that there was no “cotton or woollen waste, or rags, kept in or near the property insured,” and the by-laws, to which the insurance was expressly made subject, prohibited the insuring of any building in which any cotton or woollen waste was allowed to remain at night, and prescribed that all cotton, woollen, hempen, or oily waste, or rags, should be removed or destroyed, every evening, it was held no violation to keep clean white cotton rags, if usually kept in the stock of a country store.¹²

A positive misrepresentation of future facts, if material, will vitiate a policy as well as of present facts. Thus, where the question was, “During what hours is the factory worked?” and the answer, “We run the cards, pickers, drawing-frames, and speeders, day and night; the rest only twelve hours daily. We only intend running nights until we get more cards, &c., which are making. We shall not run nights over four months,” it was held to constitute a positive agree-

¹¹ *Daniels v. Insurance Co.* 12 Cush. 425.

¹² *Elliott v. Insurance Co.* 13 Gray, 145.

ment to desist running at night on the reception of the new cards, and within four months — the breach of which would avoid the policy.¹³

It is a matter of no consequence whether representations are attached to the policy, or contained in a separate paper, and referred to. In the latter case they are construed together, as well as in the former; and, in either case, materiality is for the jury.¹⁴

Where an application represented that two small buildings were to be removed fifteen feet, and a policy was secured, a loss occurred before the removal. It was held, thereon, that the insured was entitled to a reasonable time to make the removal; and what, under the circumstances of the case, was a reasonable time, was held a matter of fact.¹⁵

A misdescription of the property is not of itself a misdescription of the title or interest in it.¹⁶

Where goods in a store are insured, and the conditions annexed to the policy require a description of the property insured and its relative situation as to other buildings, distance from each, if less than ten rods, &c., a misstatement as to the situation of the store building with other buildings, will avoid the policy, although the store building is not the subject of the insurance — there being no difference in this respect between the building and its contents.¹⁷

Where there is no warranty, and the answer in an

¹³ *Bilbrough v. Insurance Co.*
5 Duer (N. Y.) 587.

¹⁴ *Boardman v. Insurance Co.*
20 N. H. 556.

¹⁵ *Lindsay v. Insurance Co.*
3 R. I. 160.

¹⁶ *Fire Insurance Co. v. Coates*,
14 Md. 298.

¹⁷ *Wilson v. Insurance Co.* 1
Selden (N. Y.) 60; *Sexton v.*
Insurance Co. 9 Barb. 191.

application states the nearest buildings within ten rods, but does not state all the buildings within ten rods, it is held there is no material concealment necessarily;¹⁸ and whether it is material, or not, is for the jury.¹⁹ And where the policy prohibits an alienation of the property, it is held there is no breach in anything short of a conveyance of the title.²⁰

Misrepresentation of value is subject to the same rules as that of facts.²¹

Also, in a life insurance policy, the same rules prevail. But in these, as well as others, it is held that warranties are not to be created, or extended by construction, but must arise, if at all, from the fair interpretation and clear intendment of the words used by the parties.²²

In marine insurance the seaworthiness of a vessel is a presumption of law; and whether the evidence has removed that presumption is for the jury to determine.²³ So held in Maryland; and, in Missouri, it is held that whether the unseaworthiness was a fact concealed at the issuing of the policy, is for the jury, but the court determines what unseaworthiness is.²⁴ A warrant of seaworthiness, however, only relates to the inception of a voyage.²⁵

§ 235. The question of increased risk is also a ques-

¹⁸ *Gates v. Insurance Co.* 2 Comst. (N. Y.) 46.

¹⁹ *Masters v. Insurance Co.* 11 Barb. 632.

²⁰ *Ibid.* 628.

²¹ *Keeler v. Insurance Co.* 16 Wis. 523.

²² *Campbell v. Insurance Co.* 98 Mass. 391, and cases cited.

²³ *Field v. Insurance Co.* 3 Md. 250, and cases cited.

²⁴ *Rosenheim v. Insurance Co.* 33 Mo. 237.

²⁵ *Walsh v. Insurance Co.* 32 N. Y. 435.

tion of fact, as, for instance, whether a change, such as setting up a ball alley near, increases the risk.²⁶ And whether removing from a house, and leaving it vacant;²⁷ although, in such a case, it was held that although the jury found that the vacation increased the risk, yet the owner could recover, if he used all reasonable exertions to find another tenant.

Where a policy of insurance on a store provided that if the premises were used to store, or keep any hazardous, or extra hazardous, articles, except, as provided for in the policy, by paying extra rates, the policy should be void, and there was especially mentioned in the class of special rates, the article of camphene, it was held that camphene, even to light the store, was prohibited; and would avoid the policy, except on the payment of special rates on express agreement.²⁸

But an insured may show that the change in the use of a building has decreased the risk.²⁹ And where a policy prescribes that notice of anything tending to increase the risk shall be given in a specified time, and alterations are made, and no notice given, the increase of risk is still a question for the jury.³⁰

The question whether a fire kiln for drying corn, in connection with a corn-meal mill, and whether the corn-meal mill itself is an incident to or an ordinary and appropriate part of the business of a steam-flour-

²⁶ *Shepherd v. Insurance Co.*
38 N. H. 239.

²⁷ *Gamwell v. Insurance Co.*
12 Cush. 167.

²⁸ *Westfall v. Insurance Co.*
2 Kernan (N. Y.) 292.

²⁹ *Smith v. Insurance Co.* 32
N. Y. 404.

³⁰ *Schenck v. Insurance Co.*
4 Zab. (N. J.) 452.

ing mill, were held matters of fact for the jury, under the charge that if these were not known or usual incidents, they avoided the policy.³¹

§ 236. It has been held that the question of repairs, the right to make which is reserved to the insured, as to whether they were made in reasonable time, is one to be submitted to the jury, and judged with regard to all the circumstances, such as the dates of various notices given by the parties to each other, delays occasioned by sickness of workmen, and the peculiar situation or nature of the property.³²

§ 237. Whether, when the facts are found by the jury, it appears that a policy is a wager policy, that is for one who has no insurable interest in the life, and who pays the premium, and is, therefore, void, is a question of law.³³

§ 238. Where goods are insured in one building, and it is claimed that they were burned in another, it is for the jury to say whether the policy on the house that was burned covered the goods.³⁴ And a policy covering "the property of the insured, or held by him in trust," has been held to cover cloth held to be manufactured into clothing.³⁵ The *fact* of holding belongs to the jury, the *character* to the court, under a construction of the policy.

§ 239. Whether, on a question of extra hazard, a

³¹ Washington Insurance Co. v. Merchants, &c., Insurance Co. 5 Ohio St. 476.

³² Haskins v. Insurance Co. 5 Gray, 438.

³³ Valton v. Life Ins. Co. 22 Barb. 35.

³⁴ Beatty v. Insurance Co. 52 Pa. St. 456.

³⁵ Stilwell v. Staples, 19 N. Y. 501, quoted in Insurance Co. v. Favorite, 46 Ill. 270.

certain place is to be regarded as a manufactory, is for the jury to determine.³⁶ So, where an insurance is of "bundle rods," and there is a provision that no partial loss on "bar iron" is to be paid, unless, &c., the court cannot determine, as matter of law, whether bundles of rods are bar iron; but must leave the question to the jury.³⁷

§ 240. Whether an insurance agent has authority to vary terms is also a question of fact.³⁸ And also the extent of an agent's authority, where the company, on suit, claims that the agent had only a restricted authority, and there was no written evidence to show what it was.³⁹ And the question whether the books of a company furnish sufficient data for a correct assessment, in a mutual company.⁴⁰ And whether a paper was procured with reference to an application for insurance, or not, and whether procured by fraud, or not.⁴¹

§ 241. Whether a note given to a mutual company is an ordinary open policy note, or was given as a premium note in advance, for the security of dealers, under a provision in the charter, is a question of fact.⁴² And whether a receipt of payment to a company is without consideration on the part of the insured.⁴³

§ 242. Where a part of goods shipped under an in-

³⁶ Appleby v. Insurance Co.
45 Barb. 457.

³⁷ Evans v. Insurance Co. 6
R. I. 53.

³⁸ Sheldon v. Insurance Co.
25 Conn. 221.

³⁹ Hough v. Insurance Co. 29
Conn. 23.

⁴⁰ Insurance Co. v. Under-
wood, 3 Gray, 214.

⁴¹ Knight v. Worsted Co. 2
Cush. 294.

⁴² Browner v. Hill, 1 Sand.
(N. Y.) 629.

⁴³ Insurance Co. v. Duffey, 2
Kansas, 356.

insurance were discharged, and the remainder burned before delivery, it was held that the policy covered the partial loss; and that what was a delivery and acceptance, was for the jury.⁴⁴ Also, whether goods were destroyed in the building covered by the policy; but if the loss occurs in a building containing several store-rooms, and it is uncertain whether all are intended, it is fatal to the insurers; for the language of the policy is theirs, and will be most strongly construed against them.⁴⁵ And whether articles of merchandise are such as are "usually kept in country stores," is for the jury.⁴⁶

§ 243. Under marine insurance, when a presumption of loss arises, as to a vessel on a voyage, is also a question of fact.⁴⁷

§ 244. It is held that while a policy will, or may, protect against carelessness or negligence, yet it cannot against misconduct, which is defined to be, "a transgression of some established and definite rule of action, where no discretion is left except what necessity may demand; while in contradistinction, carelessness, negligence, and unskilfulness are transgressions of some established, but indefinite rule of action, where some discretion is necessarily left to the actor." And so, where the master of a boat used a barrel of turpentine to increase the steam, and thereby the boat was set on fire and destroyed, he cannot recover his insurance, this being directly in violation of an act of

⁴⁴ *Fletcher v. Insurance Co.*

18 Mo. 197.

⁴⁶ *Ibid.*

⁴⁵ *Insurance Co. v. Updegraff*,

⁴⁷ *Clifford v. Insurance Co.* 50

43 Pa. St. 358.

Me. 209.

Congress; and it was held that the wrongful act in the use of the turpentine was for the court, and not for the jury; for though, ordinarily, questions of care, diligence, and skill are to be decided by a jury, yet it is otherwise where the law defines the very act to be done, under given circumstances.⁴⁸

§ 245. Where one about to employ a travelling agent took out a policy against his criminal defaults, the conditions of which policy provided that it should be void unless, within six days after any such defaults should occur, the insurer should receive from the insured a written statement of all the particulars, so far as the insured could give them, and after the policy had expired, the agent wrote to his employer acknowledging the misapplication of some money in his hands occurring during the life of the policy, the insured sent no notice until nearly twenty days afterwards, and the notice then merely stated that he could not give the particulars. He supplied these, however, within six days after. On an action on the policy, the defendant relied upon the delay as a breach of condition, vitiating the policy; and requested the judge to direct the verdict. But it was submitted to the jury for decision; and, on appeal it was held correct; because the agent's letter to his employer did not clearly state whether the embezzlement occurred during the existence of the policy, and so did not convey knowledge of the liability of the insurer, and the delay, therefore, was not a breach of the condition.⁴⁹

⁴⁸ Insurance Co. v. Marsh, 41 Pa. St. 393. Insurance, &c., Society, 37 Eng. L. & E. 49.

⁴⁹ Ward v. Law Property As-

§ 246. A vessel was insured against the perils of "men-of-war, pirates, rovers, arrests, restraints, detentions," &c., but this was qualified in the margin of the policy, "warranted free from loss or expense arising from capture, seizure, or detention, or the consequences of any attempt thereat" — a warranty on the part of the insured. On the 21st of April, 1861, lying at a wharf, in the port of Norfolk, Va., for repairs, the vessel was seized by a large band of men, professing to act by the authority of the State of Virginia, filled with stones, towed out into the channel, amid the cheers of the populace, and sunk at the mouth of the channel, to prevent the passage of war vessels, and thus the vessel was lost without redress. It was held that, in connection with the history of the times, it should have been left as a question of fact to the jury whether the seizure was an act of war, or only of a mob.⁵⁰

§ 247. How death occurred is a question for the jury, under an accident policy providing that no claim should be made except for injury caused by outward and visible means. The insured left his lodgings with an expressed intention of bathing. Afterwards his clothes were found on the steps of a bathing machine; and about six weeks after that, a body was washed ashore at a distant place on the coast, which was declared, on the inquest, to be the body of the insured by witnesses; but which the jury found "the body of a person unknown." It was held, first, that if this was the body, and death occurred by drowning, it was an accident within the meaning of the policy; and,

⁵⁰ *Swinerton v. Insurance Co.* 37 N. Y. 177.

second, that it was a question for the jury whether he died from the action of the water or from natural causes.⁵¹

§ 248. Where a vessel is abandoned as a total loss, it is for the jury to say whether the facts justified the abandonment; and also the propriety of a sale of the cargo under the circumstances.⁵² And whether the ship arrived at her destination.⁵³ Where a policy declares that the insured shall not have a right to abandon, until it shall be ascertained that the recovery and repairing of the vessel are impracticable, the court has the right to construe and explain the contract to the jury.⁵⁴

§ 249. The question of preliminary proof of loss is for the court, on inspection; but the authenticity of the papers belongs to the jury.⁵⁵

§ 250. The question of waiver of conditions belongs to the jury,⁵⁶ on the ground that these are for the benefit of the company.⁵⁷ And where a policy provided that it should be avoided by a transfer of the insured property, and there was such a transfer, of which no notice was given to the company, and the yearly premiums were paid regularly, and receipts given as usual, it was held a question of fact whether the transfer was known to the company, under the in-

⁵¹ *Trew v. Assurance Co.* 6 Hurl. & Nor. 843.

⁵² *Insurance Co. v. Winter*, 38 Pa. St. 185.

⁵³ *Lindsay v. Janson*, 4 Hurl. & Nor. 699.

⁵⁴ *Norton v. Insurance Co.* 16 Ill. 249.

⁵⁵ *Klein v. Insurance Co.* 13 Pa. St. 248.

⁵⁶ *Insurance Co. v. Munday*, 5 Cold. (Tenn.) 551.

⁵⁷ *Coursin v. Insurance Co.* 46 Pa. St. 323.

struction that, if so, their receipt of the annual premiums after the assignment, for four years, tended to show acquiescence, and a waiver of the forfeiture, and therefore an estoppel.⁵⁸ A provision that no action shall be brought on a loss except within one year thereafter is valid, but may be waived by the acts of the parties, although it is held that a waiver, to be binding, must be founded on a valuable consideration, or the act relied on as a waiver must be such as to estop a party from insisting on performance of conditions; and where, under a policy with the above condition, the insurer declined paying it on the ground that actions had been commenced against it by other parties, which were still pending, it was held not to amount to a waiver or an estoppel.⁵⁹

The refusal of a company to pay a loss, on the ground that they were not on the risk, operates as a waiver of the preliminary proof of loss.⁶⁰

Where a transfer is made without the consent of the company, and afterwards that consent is obtained, it waives the forfeiture, and revives the policy.⁶¹ And defects in the original proofs are waived by afterwards requesting and accepting additional proofs.⁶² If an insurance company, after receiving insufficient notice of loss, examine the claim, and refuse to pay it for other reasons, it waives the objection to the notice.⁶³ And in all these cases, it is a question for the

⁵⁸ *Buckley v. Garrett*, 47 Pa. St. 211.

⁵⁹ *Ripley v. Insurance Co.* 30 N. Y. 164.

⁶⁰ *Insurance Co. v. Coates*, 14 Md. 295.

⁶¹ *Keeler v. Insurance Co.* 16 Wis. 523.

⁶² *Bumstead v. Insurance Co.* 2 Kernan (N. Y.) 98.

⁶³ *Schenck v. Insurance Co.* 4 Zab. (N. J.) 449.

jury; as where a written notice is required by the policy.⁶⁴ But where all the facts and circumstances are admitted, it is for the court.⁶⁵

CHAPTER XVII.

OBSTRUCTIONS AND NUISANCE.

§ 251. AN obstruction to a water-course is anything which diverts it from its natural flow. And where two persons, one above, and another below, on a stream, have a right to use the stream, the upper occupier must not exceed his rights, or he will be liable for the obstruction; and where a subterranean flow of water has become so well defined as to make a regular or constant stream, the owner of the land above has no right to divert or destroy it to the injury of the person below; and the question for the jury is whether the obstruction caused by the defendants exceeded their rights.¹ And so, persons having a charter to build a bridge across a navigable stream derive no right therefrom to obstruct the navigation, and such obstructions, erected without authority of law, are nuisances, and may be abated as such by a private person, in virtue of common right. And the question for the jury is, whether the bridge is an obstruction.² And where a street is laid out over the waters of a bay, whether driving piles in the street is

⁶⁴ *Drake v. Insurance Co.* 3 Grant. (Pa.) 325.

⁶⁵ *Insurance Co. v. Evans*, 9 Md. 1.

¹ *Whetstone v. Bowser*, 29 Pa. St. 65.

² *Selman v. Wolf*, 27 Tex. 69.

an obstruction of its free use by the public, is for the jury; and if it is not submitted to them, it is cause for a new trial.³ The case was one in San Francisco, where Front Street is below low water mark, and the only mode of rendering the street passable is by driving piles and planking over them, and an injunction was laid upon the city to prohibit it perpetually from so doing, which injunction was dissolved on appeal.

§ 252. But where a public street is obstructed by cars standing across it, the court is not to refer to the jury whether the obstruction was inevitable, but must instruct them, as matter of law, that the obstruction was unauthorized and illegal.⁴

§ 253. Under the provision of a charter allowing the building of market houses and repairing them, it is lawful to obstruct a street for that purpose temporarily; and as the owners of houses and lots on a market place hold in subordination to the right and duty of the corporation to do whatever is necessary for maintaining the market, they must submit to whatever inconveniences and losses may result to them from a just exercise of the corporate rights, in consideration of the paramount public interests; but whether the exercise of those rights is just and reasonable, and the obstructions are continued an unnecessary time, are for the jury to decide.⁵

§ 254. Whether a tree in the highway did obstruct its use to the public, or cutting it down was wanton

³ *San Francisco v. Clark*, 1 Cal. 386.

⁴ *Ranch v. Lloyd*, 31 Pa. St. 370.

⁵ *St. John v. Mayor, &c., of New York*, 6 Duer (N. Y.) 316.

and unnecessary, so as to subject the overseer who did so to an action of trespass, is a question of fact.⁶ For it is held that a conveyance of land bounded by the highway carries the fee to the middle of the road, and the owner is the owner of the trees on the highway so far, and can maintain an action for damages for wantonly cutting them down.

§ 255. Where it is alleged that a highway, by land or water, is so obstructed as to constitute a nuisance, this is a question of fact.⁷ An encroachment of a fence upon a highway is not a nuisance, if it create no annoyance. There is a wide difference between a mere encroachment and a nuisance. The latter is something which annoys the public, or individuals. An individual nuisance may be abated by the party aggrieved, or he may sue for his private damages. Where all the public are alike incommoded, an indictment is the proper mode of proceeding.⁸

"A jury must determine, from all the circumstances of each particular case, whether an object permanently placed, temporarily left, or slowly moving, in a public highway, is, or is not, a nuisance; and this determination must depend on their finding whether or not the given object, under all the circumstances attending its occupation of the highway, unnecessarily obstructs the free passage of the public upon and over it;" as, for example, in the removal of buildings; and this, too, depends much upon locality.⁹ And it need not necessarily be placed in the travelled track, or even

⁶ *Winter v. Peterson*, 4 Zab. (N. J.) 524.

⁷ *Blanc v. Klumpke*, 29 Cal. 157.

⁸ *Griffith v. McCullum*, 46 Barb. 563.

⁹ *Graves v. Shattuck*, 35 N. H. 264.

upon the road-bed at all, but may be a nuisance by such near vicinity as to make the highway dangerous by frightening horses; but this, too, is subject to the explanation of circumstances to be passed on by the jury.¹⁰

The annoyances incident to the operations of a railroad are not *per se* a nuisance, but may become so in fact; which is a decision for the jury.¹¹

§ 256. But where a nuisance complained of is that of taking public property, — that is, property dedicated to the public, — and appropriating it to private use, it is exclusively a question of law for the court. It is declared that such an act is, in law, a nuisance, for the commission of which there can be no justification.¹²

§ 257. Where a dam has been maintained, without change of height, for twenty years, and, within the last ten years, lands have been subjected to flowage thereby which were dry before, it is error for the court to instruct the jury that the presumption was, in such case, that the flowage was caused by something besides the maintenance of the dam, but it should be left to them whether the flowage was caused by such maintenance.¹³ And whether a dam is a nuisance or not;¹⁴ as, where it overflows water to become stagnant and unwholesome, impairing the health of the community.¹⁵

¹⁰ *Winship v. Enfield*, 42 N. H. 199.

¹³ *Smith v. Russ*, 17 Wis. 229.

¹¹ *Bell v. R. R. Co.* 25 Pa. St. 182.

¹⁴ *Kernan v. Edelman*, 23 Pa. St. 146.

¹² *State v. Woodward*, 32 Vt. 99.

¹⁵ *Douglass v. State*, 4 Wis. 389.

CHAPTER XVIII.

UNSKILFULNESS AND NEGLIGENCE.

§ 258. As to what is a reasonable use or management, this is a mixed question of fact and law; as, for example, if the owners of a dam on a water-course by means of the dam obstruct the natural drainage of their neighbor's land, even if the land is not on the water-course, they are liable, unless the obstruction be but a natural result of the reasonable use and management of their water privileges; and the question is for the jury, under the instruction of the court.¹ It is the business of the court to instruct the jury as to the degree of diligence, or skill and care, imposed by the law upon the parties respectively, and then it is for the jury to apply the instruction to the estimate of the bearing of facts in the case. Thus, where an explosion of a locomotive occurred, and thereby an employé lost his life, an action in behalf of his widow and infant children was brought, and it was held that what constituted negligence, or ordinary care, or the want of it, in the deceased, contributing to his death, and the reasonable skill, care, and diligence exercised by the company to relieve itself of responsibility for accidents, were for the jury;² al-

¹ Bassett & Co. 43 N. H. &c., 37 Md. 168, and cases cited.
573.

² R. R. Co. v. State, for use,

though, sometimes, it is for the court to decide questions of negligence, as, what is reasonable skill and due care in the treatment of a patient by a physician, and it is error to leave this to be decided by a jury;³ and this is held to be because the question involves not only reasoning, but reasoning as to the due execution of work in a learned science. To me this does not seem conclusive, since scientific men, and even physicians, may sometimes be placed on a jury, and then these would be more competent than a court ordinarily is.

§ 259. A mandatory, that is, a gratuitous bailee receiving no hire, is only liable for gross negligence. And whether such a one used such diligence in a particular case, is a question of fact; and it was held the court erred in deciding it as a matter of law. The standard of judgment is to be defined by the court, namely; the degree of diligence required is such as an ordinarily prudent man would employ in his own business.⁴

§ 260. The question of necessary precaution sometimes becomes distinct in the decision of matters of negligence. And where it relates to modes of conveyance, there is a distinction taken between such as are to go at a high rate of speed, as railroad cars, and at less speed, as stage coaches. And so, whether a railroad company manufactures cars for itself, or purchases from others, it is held responsible for the utmost precaution in their construction. And so, where a passenger was injured by the breaking of an axle,

³ Woodward v. Hancock, 7 Jones L. (N. C.) 385.

⁴ Fulton v. Alexander, 21 Tex. 150.

through a latent defect which could not have been discovered by any external examination whatever, it was held that, notwithstanding the car had been made by a large manufactory employing none but skilled workmen, the railroad company was liable if the defect might have been discovered, during the manufacture, by means of any test known to men skilled in the business. And it is for the jury to say whether a railroad company is guilty of negligence in not ascertaining the utility of any improvement designed to render railroad travel safe, and adopting such improvement.⁵

And so, where, in England, an accident occurred through an imperfect welding, when a wheel was well worn, although the best known tests were applied when the wheel was new, and no defects discovered, yet, as no tests were applied when the wheel was old, and the tire had been re-turned, by which the defect would probably have been then discovered, it was held that the liability of the company for negligence was properly left to the jury.⁶

And, in an action for injury by fire caused by a locomotive, it was proved that the engine had none of the appliances in use to prevent sparks. But, on the part of the defendants, it was given in evidence, by scientific witnesses, that the engine was so constructed as to render such safeguards needless, to prevent the emission of sparks. And the judge left it to the jury to say whether there had been negligence on

⁵ *Hegeman v. R. R. 1 Kernan*
(N. Y.) 24, — Marvin, J., dis-
senting.

⁶ *Manser v. R. R. 6 Hurl. &*
Nor. 899.

the part of the company, either by using an improperly constructed engine, or by using improperly such an engine as the defendants' witnesses testified to as safe in its construction.⁷ And the general rule is laid down thus: "A railroad company is liable in damages for an injury resulting to any person lawfully using its road, from its neglect to introduce any improvement in its apparatus which it knows to have been tested and found materially to contribute to safety, and the adoption of which is within its power, so as to be reasonably practicable," — as, for example, frog and guard rails at switches.⁸

Where a railroad company allowed a ditch to become filled up, it was remarked by the court, on appeal, in an action of damages, "We apprehend that a railroad may, as a question of prudence and care, as well be required to have regard to the prevention of damages to a land-owner by the accumulation of surface water merely, as of a running stream, when the geographical formation and surrounding circumstances are such as to make it apparent to reasonable men that such precautions are necessary; and that, ordinarily, what would be a reasonable performance of their duty, under a given state of circumstances, would be a question of fact, and not a question of law for the court."⁹

And though it is held, on the one hand, that a riparian proprietor, whose land has been gradually washed away by a change of current caused by necessary

⁷ *Fremantle v. R. R.* 10 C. B. (N. S.) 89.

⁹ *Waterman v. R. R.* 30 Vt. 615.

⁸ *Smith v. R. R.* 19 N. Y. 133.

erections made in a stream above, has no claim for damages, whether the erections had been made in a careless and unskilful manner, or not, yet one who has had the water set back on him from below by such erections, has such claim for damage,—the latter being a direct encroachment, and the former merely consequential and indirect.¹⁰ And it is held that a railroad is not liable for consequential damages in locating or constructing their road, and that it would be error to leave it as a question of fact to the jury whether the company could, without unreasonable expense or undue injury, have so changed the site of their track as to have avoided such damage.¹¹

But where the charter requires a railroad company to purchase a turnpike track, and assume the liabilities of the turnpike corporation, before running cars, and gave them the right to use, in part, the turnpike track, then it is held that, if using the pike, or bringing the railroad track into close proximity with it, will make it dangerous to persons with teams on the turnpike, and so impair the usefulness thereof to the public, the railroad company is bound to remove the two roads from each other, or put a screen between them; and if they fail to do so, and a horse is frightened to death by a passing train, the company are liable; and that the questions whether the company have been guilty of want of care or foresight in constructing their road and the turnpike too near together, and without a screen, and whether this was

¹⁰ *Henry v. R. R.* 30 Vt. 640.

¹¹ *R. R. v. Young*, 32 Pa. St. 182.

the proximate cause of the damage complained of, are questions of fact.¹²

So the precaution of providing cars with safety beams, to prevent damage to passengers by the breaking of axles, may be required; and it is proper to submit it to the jury to say whether, taking into consideration the vigilance required of common carriers of passengers, the publicity of the invention, and its prior use, the company were or were not guilty of negligence in not ascertaining the utility and necessity of the invention, and availing themselves of it.¹³

§ 261. And, on the same principle of needful precaution in construction, it is held that highways are to be made safe by all the guards available. So, in an action against a turnpike company, by one who got out of the path in a dark night, and fell into a ditch, it appeared the company had put up no railing on the sides of the road at that place; but they interposed the defence that a pile of boards in an adjoining lumber yard was sufficient as a barrier, and that the plaintiff's intoxication caused the injury. The court submitted to the jury the condition of the road, the need of a railing at that place, the sufficiency of the pile of lumber, and the intoxication of the plaintiff as the cause of the injury. The jury found thereon for the defendants; and it was held properly submitted to them.¹⁴

And it is a question of fact whether a highway was safe, or was obstructed, or out of repair, to be deter-

¹² *Moshier v. R.R.* 8 Barb. 431.

¹⁴ *Weeks v. Turnpike Co.* 20

¹³ *Hegeman v. R. R.* 16 Barb Conn. 138.

mined on a view of all the circumstances, in reference to the nature and extent of the defect, the character of the ground, amount and kind of travel, ability of the town, and all particulars tending to show whether the highway was reasonably safe and convenient, and whether or not it ought to have been previously repaired; also whether, without fault or negligence, the obstruction came by inevitable accident, and whether the town had notice of it in time to have removed it before the accident occurred.¹⁵

And a town is liable for an injury to an elephant passing on a highway, if the injury occur by reason of a defect, and if, in the opinion of the jury, the animal was one which it was reasonably proper to take over a highway kept for the reasonable use of the public.¹⁶

And whether a sidewalk in the street of a city or town is safe and suitable is a question of fact.¹⁷

§ 262. Precautions against steamboat collisions have been held, in Missouri, however, to be questions for the court; as, for instance, what is a proper precautionary measure in itself, uninfluenced by rule, usage, or custom.¹⁸

§ 263. Comparative negligence is usually for the jury, to find whether it contributed to the injury; as, for example, where fire is communicated to weeds and dry grass, on and near a railroad track, the comparative negligence of the plaintiff and the company, in

¹⁵ *Johnson v. Haverhill*, 35 N. H. 80; *Bigelow v. Rutland*, 4 Cush. 247.

¹⁷ *City of St. Paul v. Keeley*, 8 Minn. 158.

¹⁸ *Rogers v. McCune*, 19 Mo.

¹⁶ *Gregory v. Inhabitants, &c.* 568.
14 Gray, 246.

regard to the accumulation of the combustible material.¹⁹ And so, where a sewer was being constructed in a public street, and no guard light or other special notice being set, but the plaintiff knew of the construction.²⁰ Whether due care was used by a passenger in alighting on a platform at a station, and by the company in affording proper facilities for alighting there;²¹ and whether a man found killed on a track was lawfully there at the time of the accident, and using due care;²² and whether one attempting to cross a track before the train was free from culpable negligence;²³ and whether one in the employ of a railroad company, who, knowing of a defect in the road track, yet continued in such service, and at length was injured by reason of that defect, was guilty of negligence therein;²⁴ and whether a natural protector used due care to prevent a child from wandering in the way of danger;²⁵ and whether leaving open a door into which sparks flew from an engine and burned the building, was culpable negligence on the part of the owner;²⁶ and whether one who has suffered injury on a highway resulting in death was himself negligent,²⁷ — are all within the province of the jury.

So, likewise, where a boy of sixteen or seventeen

¹⁹ *R. R. v. Nunn*, 51 Ill. 79.

²⁴ *Snow v. R. R.* 8 Allen

²⁰ *Bateman v. Ruth*, 3 Daly (N. Y.) 380.

(Mass.) 443.

²¹ *Delamatyr v. R. R. Co.* 24 Wis. 582.

²⁵ *Mangam v. City R. R.* 36 Barb. 236.

²² *R. R. Co. v. Hall*, 61 Pa. St. 361.

²⁶ *Fero v. R. R.* 22 N. Y. 210.

²⁷ *Hill v. Town of New Haven*, 37 Conn. 507.

²³ *Ernst v. R. R.* 35 N. Y. 20.

years of age, running to a fire at night, beside a fire engine, stepped into a hole in the road-bed of a railroad, and was in consequence run over by the engine and injured so that his leg had to be amputated, it was held that, though the defect in the road-bed was not caused by any act of the company, yet it was their duty to repair it, if they knew of it, and knew it was dangerous; and also that the jury, in determining whether the boy's negligence or misconduct contributed to the injury, were to consider his age, intelligence, and strength, and judge his conduct by that of boys of like age, strength, and intelligence, in general; and consider, also, whether it was common for boys, on an alarm of fire, to run along with an engine in such a manner.²⁸

And where an action was brought for the death of a child, seven years of age, by means of a car running over it, it was held that negligence is not, as a matter of law, to be presumed from the mere fact of such a child being alone and unattended in the street. Whether the permission of the parents is negligence, is for the jury to say; and where it is alleged that a car, by the carelessness of a servant of the company, was driven over a child, and caused its death by the negligence of the company and its agents, it is held that, under the pleadings, it might be shown that the car was deficient in its construction, as well as that the agent was careless in its management.²⁹

The general rule, sustained by the weight of authority both here and in England, — New York and

²⁸ *R. R. v. Fielding*, 48 Pa. St. 321.

²⁹ *Oldfield v. R. R.* 3 E. D. Smith (N. Y.) 106.

Massachusetts dissenting, however,—is, that a higher degree of care is requisite in the case of a child than an adult, the child being less capable of taking care of himself.³⁰ And, in the same way, it has been held that persons in positions of great peril are not required to have all the presence of mind and care of a prudent man in ordinary circumstances,—the law making due allowances for them, and leaving the manner of their conduct to the jury; and in such case the court has no right to determine the question of negligence.³¹ And so, a passenger in peril by the fault of the carrier may leap from a coach, if the act is not rash; while it is held that carriers are responsible for even slight neglect, and if they know, or might have known, of danger in using a coach in a particular manner, even by the exercise only of extraordinary attention, and so the danger have been avoided, they are held responsible.³²

And where a passenger was standing on the platform, notwithstanding on the inside of the car was a notice prohibiting this, and was injured while the train was running over an unfinished part of the road, where the cross-ties were too far apart and insufficiently spiked, and the accident took place by the breaking of a cleat at the end of one of the rails, while none of the other passengers, being inside the cars, was injured thereby, the defence was set up that it was the plaintiff's fault in standing on the platform while the cars were in motion. Verdict for plaintiff

³⁰ *Smith v. O'Connor*, 48 Pa. St. 220, and cases cited.

³¹ *R. R. v. Yarwood*, 17 Ill. 519.

³² *Frink v. Potter*, 17 Ill. 408

for ten thousand dollars; new trial refused; the court holding that the questions whether plaintiff had knowledge of the prohibitory notice, and, if so, whether, under the circumstances, his own act contributed to the injury, so as to exonerate the company, who were clearly guilty of negligence, were for the jury. Held, no error; and that proof of injury to a passenger is *prima facie* evidence of neglect.³³

And, at an inn, in the absence of direct evidence of negligence on the part of a guest contributing to his loss, the jury may find whether the key of the door could be turned from the outside, whether the guest used the fastenings of the door, or, if he locked it, whether it was negligence not to bolt it, or to leave the small fan-light over the door unfastened, and whether he had notice of a printed limitation of the proprietor's liability at the head of the register, so as to make it a contract by signing his name;³⁴ and, in short, whether the guest has exercised ordinary prudent care.³⁵

Whether it is properly incident to the business of raising and lowering merchandise by an elevator, for a man to go up and down with it, is a question of fact, in an action for damages in the falling of an elevator; and, also, whether the injured man was careless in omitting to observe whether the engine was in operation at the time of the accident, so that the elevator could not fall.³⁶

³³ Zemp v. R. R. 9 Rich. (S. C.) 86.

³⁴ Ramaley v. Leland, 6 Robertson (N. Y.) 365.

³⁵ Hadley v. Upshaw, 27 Tex. 550.

³⁶ Stewart v. Harvard College, 12 Allen, 65.

And where cattle are destroyed from want of cattle guards to a railroad, which the company are under obligation to build, the jury may find whether the owner was ordinarily careful not to let them run at large.³⁷ And so, where an accident occurred for want of repairs in a fence, by the company, there must be a direct, and not merely a remote, connection with the injury suffered.³⁸ And the jury may determine whether an owner is culpably negligent in allowing his cattle to remain in a field where railroad fences are out of repair.³⁹

Where a beast on a railroad would not be driven off by a person, nor by whistling of the train, and the engineer did what he could to arrest the progress of the train, but vainly, so that the animal was killed, there was no liability to the company.⁴⁰

Where goods are destroyed by fire, or are stolen after notice to a consignee, the railroad company keeping them as warehousemen for hire, the jury are to find whether the company exercised ordinary care and diligence.⁴¹

Where plaintiff was run over in the street, it is held that, unless the proof of negligence on his own part is so strong that the court would set aside a verdict in his favor as against the weight of evidence, it is not proper to take that question from the jury.⁴²

§ 264. As to positive or absolute negligence, it is

³⁷ Bulkley v. R. R. 27 Conn. 486.

³⁸ Holden v. R. R. 30 Vt. 301.

³⁹ Poler v. R. R. 16 N. Y. 479.

⁴⁰ Montgomery v. R. R. 6 Jones L. (N. C.) 464.

⁴¹ Dimmick v. R. R. 18 Wis. 474.

⁴² Williams v. O'Keefe, 9 Bosw. (N. Y.) 537.

held that the jury are to find the fact from all the circumstances, and it is held, accordingly, that where an agricultural society had a race track, and plaintiff was injured thereon in running, it was bound to use the highest care to avoid accident within the reach of human foresight.⁴³

§ 265. And the general rule is, where action is brought for a negligent injury, where the action of both parties must have concurred in producing it, that the burden of proof is on the plaintiff, to show that he was not himself guilty of negligence; and if there is no such evidence, the court may direct a verdict for the defendant. But if the question of negligence is connected with a disputed state of facts, or facts from which, if not disputed, different minds may honestly draw different conclusions, the whole matter must be left to the jury; and to warrant the court in instructing the jury that the plaintiff is guilty of negligence, the case must be such as to allow no other inference from the evidence.⁴⁴ If there is any evidence of negligence against the defendant, the case must go to the jury.⁴⁵

In Pennsylvania, it is held that what facts constitute negligence, is usually a question of law; but whether a particular negligence contributed to an accident, is a question of fact.⁴⁶ In Wisconsin, that negligence is, in general, a conclusion from the facts in evidence, to be drawn by the jury, under instruc-

⁴³ *Goodale v. Agric. Soc.* 102 Mass. 401.

⁴⁴ *R. R. v. Van Steinburg*, 17 Mich. 120, and many authorities.

⁴⁵ *Commonwealth v. R. R.* 10 Allen, 189.

⁴⁶ *R. R. v. Armstrong*, 52 Pa. St. 286.

tions from the court, and is always so where the facts or the conclusions therefrom rest in doubt.⁴⁷

In California, the jury must find the negligence of plaintiff not to have been remotely, but directly, contributory to the accident. And whether due diligence or negligence, in a particular case, is shown, is for the jury.⁴⁸ And, doubtless, this is the general rule.

The rule is defined, in Maryland, to be, that while a railroad is not under obligation to use every possible contrivance which human ingenuity might provide, yet it should be vigilant in making use of every reasonable safeguard which the nature of its business will admit, to avoid interfering with others in like pursuit of lawful avocations; and if a party receive injury by the negligence of a company, but it can be shown that his own negligence directly contributed, he cannot recover, although the company, by greater diligence, might have prevented the injury. And even in the passage of locomotives through the thoroughfares of a city, a company is only obliged to employ such reasonable care and diligence as ordinary prudence would suggest and require. But if the company do not conform to the city ordinances providing certain safeguards in regard to its operations, it is not in the lawful pursuit of its business, and is responsible for all injury, if the injured party is not in fault. And what constitutes negligence by the party injured, or proper diligence by the railroad company, is a question of fact.⁴⁹ Also, as to what

⁴⁷ *Langhoff v. R. R.* 19 Wis. 489.

⁴⁹ *R. R. v. The State*, 39 Md. 259.

⁴⁸ *Richmond v. R. R.* 18 Cal. 358.

degree of contributory negligence will exonerate the company, the rule is, that if an injured person so far contributes to the injury as that, had he exercised ordinary caution, the accident would not have occurred, there is no right to recover.⁵⁰

In Illinois, it is held that negligence is a question of law, when it consists in the omission of a duty imposed by positive requirement of law; as where a statute requires signaling, and slacking speed at crossings; and herein the jury are to determine where the accident happened, and what was the rate of speed; and where there is no statutory requirement as to signaling, whether an omission to give a signal is negligence or not.⁵¹

In Maine, it is held that whether a signaling is reasonable, and within the rule of ordinary care, is for the jury, without the opinions of experts, which are held incompetent.⁵²

In Wisconsin, it has been decided that a jury may decide whether the damaged condition of goods transported resulted from negligence of the company.⁵³

In Kentucky, likewise, with regard to animals transported; and it is held that, although a common carrier is liable for the safety of all animals carried by him, except from damage by public enemies, or the act of God, yet the rule is subject to some restrictions, as in injuries from the animal's own viciousness, or that of other animals shipped with it.⁵⁴

In New York, it is held that as the law does not

⁵⁰ Ibid. 420.

⁵¹ R. R. v. Foster, 43 Ill. 416. 477.

⁵² Hill v. R. R. 55 Me. 439.

⁵³ Congar v. R. R. 17 Wis.

⁵⁴ Hall v. Renfro, 3 Met. 52.

require extreme care, or exact diligence, in passing on a public thoroughfare, although a railroad may cross it on the same surface, it does not deprive a party injured of redress, although he was guilty of slight neglect contributing to the injury.⁵⁵ Contradictory testimony must go to the jury; or doubtful.⁵⁶ Omission to ring a bell at a crossing, as the law requires, is negligence; and if one is injured in the crossing, although careless in some degree, it is for the jury to say whether the sound of the bell would probably have attracted the plaintiff's notice, and so enabled him to avoid the danger.⁵⁷

In Pennsylvania, it is held immaterial upon which party the burden of proof is thrown by the court; it is for the jury to determine, under the circumstances, whether the plaintiff is free from inexcusable negligence.⁵⁸

In Missouri, it is held that negligence and unskillfulness are matters of fact; and that the court cannot direct a jury that particular facts show, or do not show, negligence.⁵⁹

In Massachusetts, it is held that if the whole evidence on which a plaintiff's case rests shows that he did not use due care, the court may rightfully instruct the jury that the action cannot be maintained.⁶⁰

In New York, it is held that an injured limb may be shown to the jury in evidence.⁶¹

⁵⁵ *McGrath v. R. R.* 32 Barb. 144.

⁵⁶ *Bernhardt v. R. R.* Ibid. 165.

⁵⁷ *Ernst v. R. R.* Ibid. 159.

⁵⁸ *R. R. v. McTighe*, 48 Pa. St. 319.

⁵⁹ *Huelsenkamp v. R. R.* 34 Mo. 45.

⁶⁰ *Gahagan v. R. R.* 1 Allen, 187.

⁶¹ *Mulhado v. R. R.* 30 N. Y. 370.

In Pennsylvania, it is held that a railroad company cannot impute negligence to an injured plaintiff, if the negligence charged was itself the result of an omission of duty on the part of the company, and this is for the jury.⁶²

If horses are frightened at the necessary noises of railroads, the company is not responsible.⁶³ So held in Delaware; and this, of course, is the general rule.

In Virginia, it is held that the duty of a railroad company to employ the utmost care and diligence in guarding their road against obstructions on the track, is clearly embraced in its warranty to carry passengers safely, so far as human care and foresight can go.⁶⁴

So, in England, with the management of switches.⁶⁵ So in Maryland.⁶⁶

In Missouri, it is decided that the question of negligence is to be considered by the jury in a case where a disorderly intoxicated person was put off the train; and also whether the intoxication contributed to the injury.⁶⁷

§ 266. As to negligence in seamanship, it was held, in an action against the owner of a transport for damage by collision, that the court was right in leaving to the jury the question whether the master was

⁶² R. R. v. Ogier, 35 Pa. St. 72.

⁶³ Burton v. R. R. 4 Han. (Del.) 252.

⁶⁴ R. R. v. Sanger, 15 Gratt. 230.

⁶⁵ Birkett v. R. R. 4 Hurl. & Nor. 729.

⁶⁶ R. R. v. Worthington, 21 Md. 275.

⁶⁷ Meyer v. R. R. 40 Mo. 151.

not guilty of negligent seamanship in not dropping an anchor, on the wind changing.⁶⁸ And where a vessel sunk at the wharf with a load of coal which had been seized by the sheriff under a writ of replevin, and put in charge of a keeper, it was held to be for the jury to say whether the sheriff was guilty of negligence in not taking proper precautions for the security of the vessel.⁶⁹ And it seems that a sheriff having property in custody is held to more than ordinary diligence.

The court cannot determine, as matter of law, the probability of a collision being produced between vessels which depended on the sufficiency of a cable, and the currents and counter currents of a river, at the point where the collision occurred. And where vessels are in a situation of peril from passing steamboats, it is for the jury to find whether the owners were negligent in the matter, if vessels are sunk thereby; and it is held that as steamboats have extra means of avoiding injury, they are to be held to the exercise of greater caution and exertions.⁷⁰ And so steamboats, as well as railroads, must provide all available precautions against communicating fires. And, in California, it is held to be for the court to decide what facts and circumstances constitute evidence of carelessness, and for the jury to determine the weight of those facts and circumstances.⁷¹ And the principles that, at common law, apply in cases of

⁶⁸ *Hodgkinson v. Fernie*, 40 Eng. L. & E. 306.

⁶⁹ *Moore v. Westervelt*, 21 N. Y. 105.

⁷⁰ *Holmes v. Watson*, 29 Pa. St. 457.

⁷¹ *Gerke v. Navigation Co.* 9 Cal. 255.

collisions of carriages on highways apply to collisions on navigable waters.⁷²

Negligence in the use of appropriate means for removing a sunk vessel, where the owner has not abandoned it, but attempts to raise it, is for the jury, if there is any conflict in the testimony; otherwise, for the court to determine, and direct the verdict.⁷³

§ 267. It is for the jury to determine whether a town has unreasonably neglected to fit up a new highway, or alter one already established;⁷⁴ and in not remedying a defective sidewalk;⁷⁵ and in not maintaining a railing along an embanked part of highway.⁷⁶ And whether a town has used reasonable care in constructing roads, and whether these are safe.⁷⁷ And whether a party is guilty of contributory negligence in crossing a bridge in a dark night without a light.⁷⁸ And so, whether a person injured by falling into the passage-way of a private cellar in the street was guilty of contributory negligence.⁷⁹

§ 268. In an action for damages in not caring for and extinguishing a pile of coal on fire, whereby a warehouse and contents were burned up, it was held that the jury were to determine whether the defend-

⁷² *Sawyer v. Steamboat Co.* 46 Me. 402.

⁷³ *Taylor v. Insurance Co.* 9 Barb. 369.

⁷⁴ *State v. Canterbury*, 40 N. H. 315.

⁷⁵ *Hall v. Manchester*, 40 Me. 415.

⁷⁶ *Williams v. Town of Clinton*, 28 Conn. 266.

⁷⁷ *Hall v. City of Lowell*, 10 Cush. 260.

⁷⁸ *Swift v. Town of Newbury*, 36 Vt. 355.

⁷⁹ *Beatty v. Gilmore*, 16 Pa. St. 463.

ants had used such care as reasonable, prudent men would have exercised, or whether there was mutual negligence.⁸⁰

§ 269. The question of diligence or negligence also arises in the collection of promissory notes, as due diligence of a notary in notifying the maker, or to ascertain his residence;⁸¹ or notice of dishonor;⁸² and are for the jury, if the facts are in dispute; otherwise, for the court.⁸³

Whether due diligence was used to make demand of the maker so as to charge the indorser, is for the jury, if there is conflicting evidence, under instructions from the court as to what due diligence is.⁸⁴ And so, as to collecting the proceeds of a sale,⁸⁵ or a draft by assignee;⁸⁶ they are for the court, unless evidence is doubtful.⁸⁷

But whether an agent is guilty of negligence in not instituting a suit for his principal, has been held to be for the jury.⁸⁸ And also by a creditor against the principal in a note;⁸⁹ or due diligence in a collection by a bank.⁹⁰

In Missouri, diligence in giving notice to an indors-

⁸⁰ *McCully v. Clarke*, 40 Pa. St. 406.

⁸¹ *Staylor v. Ball*, 24 Md. 197; *Adams v. Leland*, 5 Barb. 411.

⁸² *Linville v. Welch*, 29 Mo. 203.

⁸³ *Walker v. Stetson*, 14 Ohio St. 89.

⁸⁴ *Wyman v. Adams*, 12 Cush. 212.

⁸⁵ *Ewalt v. Harding*, 16 Md. 161.

⁸⁶ *Brooks v. Elgin*, 6 Gill (Md.) 254.

⁸⁷ *Bell v. Bank*, 7 Gill (Md.) 217.

⁸⁸ *Brown v. Clayton*, 12 Ga. 578.

⁸⁹ *Brown v. Brooks*, 25 Pa. St. 211.

⁹⁰ *Ayrault v. Bank*, 6 Rob. (N. Y.) 350.

er is for the court.⁹¹ Whether factors are liable for not insuring is for the jury.⁹²

§ 270. Where all the facts are agreed, it is a question of law whether an insured has used reasonable diligence in communicating a subsequent insurance to the first insurers.⁹³

§ 271. Whether, in an action of escape, the officer was guilty of negligence in making an arrest of a debtor under a *capias*, or in returning the writ in a reasonable time, is held to be a question of fact for the jury.⁹⁴

§ 272. Whether one is guilty of such negligence in not examining a railway lease, as to defeat his right to recover in an action for deceit, is for the jury.⁹⁵

§ 273. Whether miners prosecuted their claims with due diligence as against parties subsequently attempting to appropriate their water, is also a question of fact.⁹⁶

§ 274. In the foreclosure of a chattel mortgage, it is for the court to determine what time, under the circumstances, is a reasonable time, and for the jury to say whether it was foreclosed in that time.⁹⁷

§ 275. Where one stood by and witnessed a sale of land to which he had an equitable claim, whether he used due diligence to ascertain his title or not, is for the jury, in a matter of estoppel.⁹⁸

⁹¹ *Sanderson v. Reinstadler*, 31 Mo. 485.

⁹² *Huguenin v. Legare*, 11 Rich. (S. C.) 215.

⁹³ *Kimball v. Insurance Co.* 8 Gray, 35.

⁹⁴ *Hart v. Stevenson*, 25 Conn. 473. 506.

⁹⁵ *Clark v. Rankin*, 46 Barb. 574.

⁹⁶ *Weaver v. Lake Co.* 15 Cal. 273.

⁹⁷ *Wooley v. Fry*, 30 Ill. 162.

⁹⁸ *Odlin v. Gove*, 41 N. H.

§ 276. And whether one was guilty of negligence in not slaughtering hogs, so that afterwards, on a change of weather, the meat spoiled, is a matter of fact.⁹⁹

CHAPTER XIX.

FRAUD.

§ 277. THERE is a distinction between fraud in law and fraud in fact, in this, that when certain *indicia* are established, the presence of fraud is determinable by the court as a matter of law, regardless of any evil intent of the parties concerned; while fraud in fact depends on the fraudulent intent of those connected with a transaction; and the facts establishing this are for the jury. So where, in a sale of personal property, the possession does not follow and accompany the transfer, it is, in general, a fraud in law, without regard to the intention of the parties, and is a question of law for the court, and not for the jury. So, where a merchant failed, and purchased goods on credit as the agent of his wife, which goods were not at any time paid for out of her means. Afterwards, she sold the store lease, fixtures, and goods to her brother, a journeyman blacksmith, who paid no money thereon, but merely gave notes, and a guaranty that he would pay certain debts for her.

⁹⁹ *Ferguson v. Adm'r*, 1 Met. 84.

And there was no inventory made, nor any change of signs or clerks, except of one clerk; no outward change of possession. The merchant remained in the store as usual, though professedly acting as the agent of his wife's brother, who went to Texas shortly after the sale to him. The goods were levied upon by the sheriff as the husband's property, and it was held, on trial of the right of property, that the ownership was in him, his wife not having paid for the goods from her own means; and that the sale to her brother was a case of retained possession, without visible change, and therefore fraudulent and void — a fraud in law, even if the formal sale was honest in intent, and in payment of the purchase money; and that the court should so have instructed the jury, leaving them to determine the facts as to possession, if disputed.¹

§ 278. Fraud, however, is not presumed, but must be distinctly and clearly made out; and cannot be inferred merely from equivocal circumstances, nor on slight evidence; nor is it to be considered as a single fact, but a conclusion drawn from circumstances. And in matters of conveyances, these are not void for fraud because their effect is to hinder, delay, and obstruct creditors, but it must be made with that intent, to avoid it as fraudulent. Nor can the actual secret intent of a grantor, however bad, affect a *bona fide* purchaser, without notice.²

And so, where one executes a gift, and afterwards becomes insolvent, this event will not avoid the gift, unless it is shown that, at the time the gift was made,

¹ Milne v. Henry, 40 Pa. St. 357.

² Hollister v. Loud, 2 Mich. 312, and cases cited.

there was in the mind of the donor an intention thereby to defraud future creditors.³

And if, after delivery, the property is subsequently returned to the vendor, although it may be a circumstance tending to show only a colorable transaction, yet the law will not presume fraud thereon, but the fact of fraud must be proved by direct or circumstantial evidence.⁴ The fraudulent intent, however, may be shown from separate and independent acts and declarations of the parties.⁵ And where there is a voluntary conveyance for natural love and affection, the jury are to determine whether it is in good faith or not, from the reasonableness of the provision, the amount of the giver's indebtedness, the nature and sufficiency of the fund remaining to discharge that indebtedness, and other circumstances revealing motives.⁶

And although there are cases where it is said the law presumes fraud from certain acts, yet fraud in fact is only the conclusion of the law upon facts proved; and a court cannot charge a jury thereon that one is presumed to intend the natural consequences of his own acts. Fraud, and fraudulent intent, according to the overwhelming weight of authority, are always for the jury.⁷ And so, where fraudulent intent is to be inferred from facts and circumstances which, in legal contemplation, are mere badges of fraud, and not fraud *per se*, these must be

³ Creed v. Bank, 1 Ohio St. 9.

⁶ Pomeroy v. Bailey, 43 N. H.

⁴ Wright v. Grover, 27 Ill. 430. 122.

⁵ Pomeroy v. Bailey, 43 N. H.

⁷ Wakeman v. Dalley, 44 Barb. 498.

submitted to the jury.⁸ It seems that, in North Carolina, intent of fraud is held to be always for the court.⁹ But where a provision in a deed may be for the benefit of creditors, so that a deed is not fraudulent on its face, it is held for the jury,¹⁰ which corresponds with the general rule. And fraud in fact belongs to the jury, even though connected with fraud in law; and in such case it is held error for a court to direct a verdict, however plain a case may be.¹¹

§ 279. It is held that where the law declares certain facts to be conclusive evidence of fraud, a verdict against such conclusion will be set aside; but where it declares them to be merely presumptive evidence of fraud, the jury may find against the presumption.¹²

Although fraud is for the jury, yet it is a question of law whether the evidence tends, in any respect, to make out fraud.¹³

And where a chattel mortgage contains no unlawful provisions, it can only be avoided by proof of fraud in fact, which is exclusively a question for the jury. If it were void on its face, it would be the duty of the court to pronounce it so; but the court cannot look at facts outside of the instrument, and treat them, when found by the jury, as a part of the instrument itself, or instruct the jury if they find such facts, the instrument is void, where the statute refers the ques-

⁸ *Van Hok v. Walton*, 28 Tex. 72.

Harper, 44 Pa. St. 206; *De Leon v. White*, 9 Tex. 598.

⁹ *Foster v. Woodfin*, 11 Ired. 339.

¹² *Billings v. Billings*, 2 Cal 113.

¹⁰ *Young v. Booe*, 11 Ired. 347.

¹³ *Gage v. Parker*, 25 Barb.

¹¹ *Ehrisman v. Roberts*, 68 Pa. St. 311; *Huntzinger v.*

145; *Erwin v. Voorhees*, 26 Barb. 130.

tion of fraud to the jury in such matters.¹⁴ It is otherwise at common law, excepting the most ancient common law.¹⁵

Where there is no conflict in the evidence, the question of change of possession is one of law. Where the testimony is conflicting, and the facts uncertain, the jury find the facts; and the court are to say what facts constitute a change of possession.¹⁶

§ 280. These principles, so stated in a general way, we will now proceed to apply somewhat specifically. And, first, in regard to fraudulent sales of personal property.

In a public sale under judicial process, where the only bid offered is by the crier of the sale, under the direction of the officer, and the bid was greatly below the actual value, said to be in consequence of misrepresentations on his part, which deterred others from bidding, the fraudulent intent of the buyer it was held could not be decided by the court as matter of law, but must go to the jury.¹⁷ And whether, by any means, bids were chilled at a sheriff's sale.¹⁸ And so, whether the employment, by an owner, of a by-bidder is in good faith, to avoid a sacrifice, or for a fraudulent purpose of enhancing the price, by pretended competition, is matter of fact.¹⁹

Also, where a minor purchases, partly on credit, from a firm in straitened circumstances, this does not

¹⁴ *Bagg v. Jerome*, 7 Mich 157.

¹⁵ *Gibson v. Love*, 4 Fla. 217.

¹⁶ *Burrows v. Stebbins*, 26 Vt. 663.

¹⁷ *Brotherline v. Swires*, 48 Pa. St. 69.

¹⁸ *Manning v. Dove*, 10 Rich. (S. C.) 401.

¹⁹ *Reynolds v. Dechaums*, 24 Tex. 177.

constitute fraud in law, and avoid the sale as to creditors of the firm. Under such circumstances, it is for a jury to inquire into the fraud, if any exists.²⁰

And also whether, where a third party furnished the consideration in the sale, it was a fraudulent transaction.²¹

Where goods are purchased with the fraudulent intent not to pay for them, the purchaser does not acquire title; which intent may be deduced from acts as well as words; but where the purchaser, though greatly embarrassed, hopes to retrieve himself, and has an honest intention to pay for the goods, title passes. And so, where, after a course of dealing by sales on credit for several years, the seller required the buyer to furnish business paper, who promised to do so, to be delivered whenever the seller required, and so received the goods, and within three weeks failed, and made an assignment for a large amount, having demands due him only to about half the sum, and nothing against the merchants whose paper he had promised to procure, except a few open accounts, which he had pledged to creditors along with the other claims, it was held that the court had no right to dismiss the complaint, but should have submitted to a jury the apparent circumstances of fraud.²²

And whether a sale is fraudulently made to evade an execution, is also matter of fact;²³ and although such sale is secret, and no means taken to apprise the

²⁰ *Matthews v. Rice*, 31 N. Y. 460.

²¹ *Foster v. Berkey*, 8 Minn. 357.

²² *King v. Phillips*, 8 Bosw. (N. Y.) 607.

²³ *Deakers v. Temple*, 41 Pa. St. 242.

public of it, these circumstances do not make the sale fraudulent in law; but, as facts, they throw suspicion on the transaction to be considered by the jury.²⁴

And whether a sale was induced by fraudulent representations by a third party as to the credit of a purchaser.²⁵

Fraudulent representations by the agent of a mining company, in selling the stock of the corporation, and whether the purchaser was thereby deceived, are for the jury.²⁶ And where one was induced to sell his farm in exchange for worthless railroad stock, by means of false representations, it was held that all matters tending to show that the statements of the defendant as to the value of the stock, and the condition of the company, were falsely made, and that the plaintiff, though having some knowledge of the character and responsibility of the company, was governed by the representations of the defendant, who was a financial agent of the corporation, and that representations were made by the defendant, on the same day and only a short time before the agreement with the plaintiff, designed to influence and actually influencing the plaintiff in making the contract, are all questions for the jury to decide in the case.²⁷

And so, in an action for fraud in the sale of patent rights, it was held that it was for the jury to decide upon the connection and effects of an extended conversation between the parties, at the time of the sale.²⁸

²⁴ *Warner v. Norton*, 20 How. 458.

²⁵ *Zabriskie v. Smith*, 3 Kernan (N. Y.) 329.

²⁶ *Crump v. Mining Co.* 7 Gratt. (Va.) 369.

²⁷ *Yates v. Alden*, 41 Barb. 175.

²⁸ *Peck v. Bacon*, 18 Conn. 387.

Where a cow was purchased to improve the breed of cattle, and it afterwards appeared there was a latent defect in the animal disqualifying her for this purpose, and there was some evidence that this was known to the vendors at the time of the sale, and the court, on the trial, was asked to charge the jury that, if they found these facts, the defendants would be guilty of fraud, it was held that the court properly refused to do so, since this was asking of the court a conclusion of fact, and not of law.²⁹

§ 281. The possession, by the vendor, of personal property after the sale thereof, is held to be a badge of fraud, although it is not so as to real estate, of which the transfer of title may be, and usually is, otherwise made public. And it is held to be for the court, as fraudulent in law,³⁰ and yielding a presumption which requires explanation to remove it,³¹ although not so as to real estate;³² and although there is an exception also in the case of property remaining with a defendant in execution, of which a jury is the judge of the fact.³³ And also held, that where a corporation puts its mills and stock into the hands of persons who had made large advances in money, they to run it as special owners, and in the name of the corporation until the advances were paid, the question whether there has been such a retention of the goods as to be fraudulent against creditors, by the corporation, is for the jury.³⁴

²⁹ *Hadley v. Importing Co.* 13 Ohio St. 505.

³⁰ *Dewart v. Clement*, 48 Pa. St. 413.

³¹ *Gibson v. Hill*, 21 Tex. 225.

³² *Steward v. Thomas*, 35 Mo. 208.

³³ *Neece v. Haley*, 23 Ill. 416.

³⁴ *Howe v. Keeler*, 27 Conn. 553.

Where the facts are disputed, the matter is for the jury to decide whether there were acts of ownership and change of possession; otherwise for the court to state, as law, whether the facts constitute a continued and exclusive possession in the vendee.³⁵

An apparent constructive delivery, as of a lot of timber growing, is for the jury to say whether there is such a delivery and change of possession as the nature of the property is capable of.³⁶ And where there is any evidence of good faith, it seems it is for the jury to decide.³⁷ And a party continuing in the possession of goods sold must prove good faith affirmatively, on account of the presumption of the law against him.³⁸

Though actual possession be taken, yet if the sale was made to defraud creditors, it is void as to them, and this is for the jury; as if a son in failing circumstances transfer his property to his father.³⁹

In Michigan, and probably elsewhere, the statute gives the question of fraud as to possession to the jury.⁴⁰

Where the validity of a sale depends on whether it was made with intent to hinder, delay, or defraud creditors, the court is bound to submit it to the jury.⁴¹ And the words "hinder and delay" are to be taken in their legal or technical, and not their literal, sense.

³⁵ *Hodgkins v. Hook*, 23 Cal. 581.

³⁶ *Chase v. Ralston*, 30 Pa. St. 539.

³⁷ *Thompson v. Blanchard*, 4 Coms. (N. Y.) 303.

³⁸ *Randall v. Parker*, 3 Sand. (N. Y.) 69.

³⁹ *Forsyth v. Matthews*, 14 Pa. St. 100.

⁴⁰ *Jackson v. Dean*, 1 Doug. 519.

⁴¹ *Peck v. Crouse*, 46 Barb. 151.

The statute refers only to an improper or illegal hinderance, or delay, not to such as is reasonable and fair in the exercise of the well-established right to prefer creditors; so that a conveyance made to prevent creditors from sacrificing the property of a debtor by a sale, or to prevent a race of diligence among one's creditors for his property, by appropriating it to preferred creditors, is not within the statute.⁴²

§ 282. Fraud in regard to chattel mortgages is subject to the same rules, in the main, but has, of course, some distinctive features.

The fact that a note and chattel mortgage were given for a larger sum than was actually due, is not conclusive evidence of fraud, since it might have been so by mistake; and it is a question for the jury whether it was done in good faith, or in fraud of creditors.⁴³

But where a retail store was sold, and chattel mortgage taken on the entire stock by schedule, and the mortgage provided also that all articles of a like nature, which might be in the store at the time of default in the condition, should be subject to it, and that the mortgagor should continue in possession, but should not sell on credit, it was held that the mortgage was fraudulent against creditors, on its face, and should not therefore be submitted to a jury.⁴⁴ And to permit mortgaged property to remain in the hands of the mortgagor, contrary to the terms of the mortgage deed, is held fraudulent *per se*, and admits no explanation.⁴⁵ So, where a mortgage, besides per-

⁴² Hefner v. Metcalf, 1 Head. (Tenn.) 579.

⁴⁴ Edgell v. Hart, 5 Selden (N. Y.) 213.

⁴³ Wooley v. Fry, 30 Ill. 158.

⁴⁵ Funk v. Staats, 24 Ill. 643.

mitting the mortgagor to remain in possession, allows him to sell the goods as his own, it is fraudulent in law, and void as to creditors.⁴⁶

In New York, however, possession by mortgagor is explainable.⁴⁷ And in New Jersey.⁴⁸ And there may be a few other exceptions.

The fact that goods mortgaged are partly perishable, does not necessarily avoid the mortgage; but the character and condition of the goods are matters to be considered by the jury in determining whether a mortgage is fraudulent.⁴⁹

Iowa seems to be an exception to the adoption of the rule that a mortgage which gives the mortgagor the right not only of retaining possession, but also of disposing of the mortgaged property as his own, is *per se* void.⁵⁰

A mortgage without delivery is held, in New York, to be adjudged void as a matter of law, by the court, until some evidence of good faith is given; and then the presumption of law is sufficiently overcome to justify sending it to the jury.⁵¹

Where the mortgage is fair on the face, but is affected with a secret trust in favor of the grantor, as such secret trust can only be shown by extrinsic evidence, the existence of fraud, or an intent to hinder, delay, or defraud creditors, is matter of fact for the jury.⁵²

⁴⁶ *Griswold v. Sheldon*, 4 Coms. (N. Y.) 587.

⁴⁷ *Ibid.*

⁴⁸ *Miller v. Pancoast*, 5 Dutch. 250.

⁴⁹ *Googins v. Gilmore*, 47 Me. 13.

⁵⁰ *Torbert v. Hayden*, 11 Iowa, 438. See also *Ibid.* 573.

⁵¹ *Allen v. Cowan*, 28 Barb. 105.

⁵² *Zeigler v. Maddox*, 26 Mo. 577.

§ 283. Also fraudulent conveyances of land are a very extended branch of the law. The principles, however, falling within the limits of the present investigation are not very numerous, or prolix in statement, so far as adjudications run. The determination of the fraudulent intent is almost always for the jury, since it can seldom be determined on the face of the instrument; and the question of fraud, therefore, is dependent on extrinsic evidence, which, in almost every instance, carries a matter to the jury. Even where fraud is a mixed question of law and fact, the jury can be instructed in the law.⁵³

A voluntary conveyance is not *per se* fraudulent; and whether it be so is a question of fact depending on the intention of the parties.⁵⁴ Where, however, the legal effect of a voluntary conveyance is to hinder or delay creditors, it has been held, in Indiana, that the court will pronounce it void.⁵⁵ When there is no dispute as to the facts, the court, of course, will pronounce upon their bearing on the interpretation of the instrument.⁵⁶ Otherwise, the *bona fides* of a voluntary conveyance is for the jury.⁵⁷ There is no legal presumption of fraud in connection therewith;⁵⁸ but this depends upon the intent; and the court has no right to assume that such an intent is proved, even if the evidence strongly tends in that direction.⁵⁹

⁵³ McLaughlin v. Bank, 7 How. 220.

⁵⁴ Dygert v. Remerschnider, 32 N. Y. 637.

⁵⁵ Ewing v. Gray, 12 Ind. 70.

⁵⁶ Gerrish v. Mace, 9 Gray, 236.

⁵⁷ Pomeroy v. Bailey, 43 N. H. 119.

⁵⁸ Babcock v. Eckler, 24 N. Y. 625.

⁵⁹ Gardner v. Boothe, 31 Ala. 189.

The question of the validity of a voluntary conveyance to a wife arises between her and her husband's creditors only, and is held a question of fact.⁶⁰ To invalidate such a deed as against creditors, it is not needful that a debtor believe himself insolvent, or in reality be insolvent, at the time, if his solvency is contingent upon the stability of the market in relation to his business. So, where, on the first of May, a corn merchant largely indebted, but not insolvent, nor apprehending insolvency, bought some land, and took the deed to his wife, and on the 15th of June bought a lot of corn, giving a check therefor post-dated the 24th, and on the 16th he and his wife conveyed the land to their son-in-law, in trust for her, and remainder to her heirs, and on the 23d he suspended payment in consequence of tidings from Europe of a fall in the price of corn, it was held that the trust deed, and also the original conveyance to the wife, were fraudulent, and void as against the seller of the corn, and holder of the check.⁶¹

Where a third party pays the consideration for the purchase of land, his existing creditors can sell the land under execution against him, although no trust results to himself for his own benefit; the payment being regarded as a fraud on them, where he was under no legal or moral obligation to furnish the money. But where the consideration is paid under a moral obligation to the grantee in the deed, no trust results in favor of creditors. And this is for the jury to decide.⁶²

⁶⁰ *Holman v. Martin*, 12 Ind. 554.

⁶² *Wait v. Day*, 4 Denio

⁶¹ *Carpenter v. Roe*, 10 N. Y. (N. Y.) 445.
230.

There may be a fraudulent foreclosure of a mortgage; as where there is an understanding that the mortgagor shall be allowed to redeem notwithstanding the foreclosure, and under the arrangement the mortgagee conveys to a trustee for the benefit of the mortgagor's wife and children, and in certain contingency for his own benefit, it was held void as to creditors.⁶³ And where there are any facts and circumstances from which a jury can draw an inference that a conveyance is made to hinder, delay, or defraud creditors, they are to determine the character of the instrument; although it is held not error, in such case, for the judge below to express an opinion on the facts, provided it be not in the form of a binding instruction.⁶⁴

§ 284. Fraudulent misrepresentations in the sale of land, as, for example, as to its quality, are held matter of fact. Thus, in a case of the kind, where there was evidence of an agreement on the part of the defendant, in an action on a bond, to waive inspection of the land and take the risk of its quality, it was held not error to instruct the jury that if they found fraudulent misrepresentations of the plaintiff concerning the land, and that the defendant had not waived inspection at his own risk, they should find for the defendant, — the questions of fraud, waiver, false representations, and assumption of risk as to quality, all being for the jury.⁶⁵

§ 285. A fraudulent entry of government or patent

⁶³ *Smith v. Parker*, 41 Me. 452.

⁶⁴ *Graham v. Smith*, 25 Pa. St. 325.

⁶⁵ *Burr v. Todd*, 41 Pa. St. 214.

lands is a matter of fact.⁶⁶ And whether a surveyor has run lines wrongly, by fraud or mistake.⁶⁷ And whether, in a contract for the sale of lands, there was fraud, or misrepresentation, or an offer to fulfil the terms thereof;⁶⁸ but where an answer seeks to avoid a contract by reason of fraudulent misrepresentations, it must state in what they consisted, and they must be of matters of fact of which defendant was ignorant; and not of law.⁶⁹ And whether there was fraud in an auction sale of lots, on an exhibition of a plat thereof, is for the jury.⁷⁰

§ 286. And where a will is written on several sheets of paper fastened by a string, it is a question of fact whether the sheets were attached at the time of the signing, or whether there has been a subsequent fraudulent addition.⁷¹

§ 287. Also, whether the declarations of a former owner of chattels were made in good faith, or in order to prevent his creditors from attaching the property, under an alleged conditional sale;⁷² and whether there is a fraudulent combination between vendors and purchaser to charge another as partner;⁷³ and whether a judgment was fraudulently obtained.⁷⁴ And whether an award is void through fraud, is held also to be for the jury.⁷⁵

⁶⁶ *Waller v. Von Phul*, 14 Mo. 88.

⁶⁷ *Bentley v. Rickabaugh*, 62 Pa. St. 281.

⁶⁸ *Williams v. Bentley*, 29 Pa. St. 272.

⁶⁹ *People v. Supervisors*, 27 Cal. 676.

⁷⁰ *McCall v. Davis*, 56 Pa. St. 433; *Griffith v. Ely*, 12 Mo. 520.

⁷¹ *Ginder v. Farnum*, 10 Pa. St. 100.

⁷² *Beedy v. Macomber*, 47 Me. 455.

⁷³ *Porter v. Wilson*, 13 Pa. St. 650.

⁷⁴ *Maverick v. Salinas*, 15 Tex. 57.

⁷⁵ *Duren v. Getchell*, 55 Me. 251.

§ 288. In an assignment for the benefit of creditors a debtor may in good faith prefer creditors; as where one assigned a colliery to a creditor to be worked for the payment of the indebtedness, with the stipulation that afterwards the grantee should pay over the balances as the grantor should direct, it was held valid, unless there was an intent to hinder, delay, or defraud other creditors; of which intent the jury were to judge.⁷⁶

The whole property may be assigned to a single creditor, or in unequal proportions to different creditors.⁷⁷ Of course, a fraudulent intent, if apparent on the face of the instrument, may be found by the court, or otherwise by a jury; but it is not presumed; although it is held that the fraud of the assignor cannot be cured by want of co-operation or knowledge in the assignee;⁷⁸ the only matter being the intent of the assignor at the time of making the transfer.⁷⁹ The law always presumes in favor of innocence, and against fraud, and will never infer evil intentions and dishonest purposes from language or conduct susceptible of upholding those which are good and honest;⁸⁰ the maxim being *Odiosa et inhonesta non sunt in lege præsumenda, et in facto quod in se habet, et bonum, et malum, magis de bono quam de malo præsumendum est.*

In Missouri, it is held that a deed of assignment giving the assignee power to sell the goods on credit,

⁷⁶ Vallance v. Insurance Co.
42 Pa. St. 45.

⁷⁷ Wynne v. Glidewell, 17
Ind. 448.

⁷⁸ Gere v. Murray, 6 Minn. 305.

⁷⁹ Matthews v. Poultney, 33
Barb. 127.

⁸⁰ Norton v. Kearney, 10 Wis.
451.

does not render the deed void *per se*.⁸¹ The want of pecuniary responsibility on the part of the assignee is not conclusive evidence of fraud.⁸² Nor the fact that the deed authorizes the assignee to sell the property at public or private sale, for cash or on credit, and provides that he shall not be answerable for the negligence or misconduct of other persons; although these are circumstances to go to the jury on the question of fraud.⁸³ The debtor, it seems, may, under restrictions consistent with the deed, remain in possession to control and manage the property as agent of the assignee;⁸⁴ although this possession is *prima facie* evidence of fraud, but subject to explanation.⁸⁵

Under certain circumstances, it has been held that a jury was authorized to find that the indorsee of a promissory note might release the maker in consideration of a voluntary assignment for the benefit of creditors; although the note remained in the hands of the indorser as his property, with the knowledge of the maker.⁸⁶

Whether there has been a delivery of possession under an assignment is a question of fact; and it is not necessary that the goods should be removed from the building in order to constitute such delivery.⁸⁷

In Wisconsin, however, the restriction of an assignee's liability and allowing him to sell on credit,

⁸¹ Johnson v. Assignee, 30 Mo. 331.

⁸² Clark v. Groom, 24 Ill. 316.

⁸³ Baldwin v. Peet, 22 Tex. 714; Carlton v. Baldwin, 22 Tex. 731.

⁸⁴ Linn v. Wright, 18 Tex. 336.

⁸⁵ Howerton v. Holt, 23 Tex. 52.

⁸⁶ Steward v. Strippleman, 16 Tex. 174.

⁸⁷ Hall v. Wheeler, 13 Ind. 371.

avoids the assignment, contrary to the rulings above stated.⁸⁸

The intent to defraud, &c., must be connected with the making of the instrument itself, and not merely with some other independent act. And so, the court remarked, on certain instructions, that, "the charge given at the circuit is certainly erroneous, where it says that unless the assignor surrendered to the assignee all the property which he had liable to execution at the time of executing the assignment, the instrument is void, and that if he did not deliver all his property to the assignee, the assignment is void; and that if he carried off this five thousand dollars, or the bag of gold, whatever it may have contained, the assignment cannot be upheld; and that it became the duty of the jury to find that it was executed with intent to hinder, delay, and defraud creditors; and that if, when he executed the assignment, he intended to reserve the five thousand dollars to his own use, and did take it away with him to Europe, the case is the same as if the money had been reserved on the face of the assignment."⁸⁹

In Missouri it is held — in exception to the general rule, I think — that to make an assignment void for fraud, the assignee must be a party to the fraud knowingly.⁹⁰ And it is held that no subsequent act of the assignor can vitiate the instrument, which is consistent with the doctrine stated above.⁹¹ Also, in that state, held, that an assignment is not avoided

⁸⁸ *Hutchinson v. Lord*, 1 Wis. 313.

⁹⁰ *Wise v. Wimer*, 23 Mo. 239.

⁸⁹ *Wilson v. Forsyth*, 24 Barb. 128.

⁹¹ *Gates v. Labeaume*, 19 Mo. 17.

because it has a tendency to delay creditors, but without any intent to do so on the part of the assignor.⁹² In some states a different rule prevails. But this is the general rule.

And, in Indiana, it is held that the inquiry, in an action to set aside a voluntary assignment, should always be whether the act was a *bona fide* transaction, or a mere trick or contrivance to defeat creditors, — whether it was to pay his debts, or not; and whether it was on a full consideration; and the presumption of the law is always against bad faith, so that whoever attacks an instrument must clearly prove the fraud.⁹³

CHAPTER XX.

MALICE.

§ 289. THE same distinction exists in regard to malice that we have already noticed in respect to fraud, namely; there is malice in law presumed from certain acts, and malice in fact, or actual malice, inferable from a combination of circumstances in evidence, generally speaking. The former, of course, is for the court, and the latter for the jury, to decide upon.

Malice aforethought is an essential ingredient in the crime of murder; and if a homicide be committed in the heat of passion, produced by adequate provocation, and before a reasonable time has elapsed for the

⁹² Gates v. Labeaume, 19 Mo. 17.

⁹³ Stewart v. English, 6 Ind. 176.

blood to cool, and reason to resume its habitual control, and is the result of the temporary excitement by which the control of reason was disturbed, rather than of any wickedness of heart, or cruelty, or recklessness of disposition, the offence is manslaughter only. And the question as to what is an adequate or reasonable provocation, is one of fact for the jury. And, also, whether a reasonable time had elapsed for the passions to cool, and reason to resume its control.^{1*}

§ 290. Where a mode of punishment by the master of a ship is unjustifiable, whether it was from malice, hatred, or revenge, is a question of fact for the jury.²

And express malice, from the facts and circumstances of the case, is for them to infer; and the court cannot instruct them that there is no evidence of express malice.³

§ 291. In matters of malicious arrest and malicious prosecution, the two questions of malice and probable cause of action, are closely allied, and, it may be said, interwoven. However, it is held, theoretically, that, in such cases, the question of malice is always a question of fact, and must be submitted to the jury; while a want of probable cause, which is equally essential to sustain such an action, is to be determined by the court, as a question of law;⁴ and so, whether, on the plaintiff's evidence, a probable cause is proved.⁵

Where one was arrested on a charge of fraud, and it appeared it was for the purpose of compelling him

* But see *ante*, p. 140.

¹ *Maher v. People*, 10 Mich. 219.

⁴ *Von Latham v. Libby*, 38 Barb. 343.

² *U. S. v. Alden*, Sprague, 95.

⁵ *Kidder v. Parkhurst*, 3 Al-

³ *People v. Roberts*, 6 Cal. 217. len, 395.

to surrender certain promissory notes to the prosecutor, of which they were joint owners, it was held that such a prosecution was without probable cause, and malicious in legal contemplation.⁶ But it is held that in an action for malicious prosecution, the burden of proof is on the plaintiff to show both malice and the want of probable cause.⁷ And even the existence of malice does not raise the presumption of want of probable cause.⁸ Nor will malice alone sustain an action for malicious prosecution.⁹ Malice, however, may be inferred from want of probable cause, and the latter determined by a jury, when the facts are controverted;¹⁰ but under the instructions of the court. Where the facts are undisputed, the judge determines the legal effect of the facts, and directs the verdict thereon;¹¹ and if the jury do not follow the instruction positively, the verdict will be set aside.¹²

Whether a justice of the peace in issuing a warrant improperly, for the arrest of an individual, did it maliciously, is a question for the jury.¹³

It is held that, on the trial of a prisoner on the charge of murdering his wife, the state has a right to prove a long course of ill treatment by him towards his wife, and whether an alleged reconciliation was real or pretended, so as to affect the question of malice, is for the jury.¹⁴

⁶ Kimball *v.* Bates, 50 Me. 309.

⁷ Ritchey *v.* Davis, 11 Iowa, 126.

⁸ Wade *v.* Walden, 23 Ill. 425.

⁹ Israel *v.* Brooks, 23 Ill. 575.

¹⁰ Cloon *v.* Gerry, 13 Gray, 202.

¹¹ Besson *v.* Southard, 10 N. Y. 240.

¹² Waldheim *v.* Sichel, 1 Hil. (N. Y.) 47.

¹³ State *v.* Allen, 22 Mo. 318.

¹⁴ State *v.* Rush, 12 Ired (N. C.) 383.

In an action on the case for a disparaging statement published concerning plaintiff's goods, whereby he sustained special damage, malice is presumed from the fact of the falsity of the publication. But if the defendant rebuts the presumption by proof that the publication was honestly made, and that there was a reasonable occasion for it, this proof makes the publication privileged, and is a good defence; unless the plaintiff can show malice in fact, and has verdict thereon.¹⁵

In an action of trespass for the destruction of property, the value of the property is the measure of damages, unless it was done wantonly or maliciously; which is a question of fact.¹⁶

In slander the law implies malice, when the words are proved; unless in the matter of privileged communications, where the speaker is under a legal or moral duty towards the person to whom he makes the communication. In this case, malice must be proved, and go to the jury.¹⁷

The general rule is thus stated in regard to malicious prosecutions, by the Supreme Court of Pennsylvania: "Want of probable cause is not malice itself, but only evidence of malice. It has not the force of a legal conclusion; and, therefore, the existence of malice is a fact to be found by a jury. It is true, there are certain things which, if proved, the law declares to be conclusive evidence of malice; but mere

¹⁵ *Swan v. Tappan*, 5 Cush. 104.

¹⁶ *Wylie v. Smitherman*, 8 Ired. 239.

¹⁷ *Adcock v. Marsh*, 8 Ired. (N. C.) 361.

want of probable cause is not one of them. If a prosecution be instituted for the purpose of extorting money or other property, the law implies malice; and if, in this case, the prosecution against the plaintiff below was begun, or continued, to obtain a title to the horse alleged to have been stolen, that fact was conclusive evidence of malice, which the jury were bound to receive as such.”¹⁸

And the Supreme Court of Indiana thus define probable cause as, “that apparent state of facts, found to exist upon reasonable inquiry; that is, such inquiry as the given case rendered convenient and proper, which would induce a reasonably intelligent and prudent man to believe the accused person had committed, in a criminal case, the crime charged; and in a civil case, that a cause of action existed.”¹⁹

It is held, in England, as well as in this country, that reasonable and probable cause is one of law, for the judge to decide.²⁰

In Iowa, it is held a defence that the defendant acted under the advice of counsel, on a full statement of the facts and circumstances; but if he misrepresented the facts to the counsel, or does not, in good faith, act on the counsel’s advice, or where it is evident that he did not himself believe there was good cause for the prosecution, or where both counsel and client acted in bad faith, the advice of counsel is no shield, and the *bona fides* is for the jury to determine.²¹

¹⁸ Schofield v. Ferrers, 47 Pa. St. 196.

¹⁹ Lacy v. Mitchell, 23 Ind. 67.

²⁰ Hailes v. Marks, 7 Hurl. & Nor. 55.

²¹ Center v. Spring, 2 Iowa, 403.

It is held doubtful whether *prima facie* the want of probable cause is established by the order of the judge discharging the arrest.²²

It is held a justification if the officers of government think there is probable cause, in Pennsylvania; and the court say, "If the officers of the state, who are appointed on account of their legal learning, consider that a given state of facts is sufficient evidence of probable cause, how can the private citizen be said to be in fault in acting upon such facts; and how can the state condemn him in damages for so doing. To decide so is to use the machinery of government as a trap to insnare those who trust in government for such matters, and who ought to trust in it. If such officers make a mistake, it is an error of government itself, and government cannot allow the citizen to suffer for his trust in its proper functionaries." ²³

In an action for the abuse of legal process, malice, or probable cause, need not be proved or alleged; since unlawful acts wilfully done are malicious *per se*, and probable cause cannot be predicated for a prosecution to accomplish a purpose known by the prosecutor to be unlawful.²⁴ And it need not even be shown that the action has terminated. And exemplary damages may be given in all actions for malicious prosecution.²⁵

If the facts on which the question of reasonable cause rests are doubtful, it is held, in New York, that

²² *Gordon v. Upham*, 4 E. D. Smith (N. Y.) 10.

²³ *Laughlin v. Clawson*, 27 Pa. St. 330.

²⁴ *Page v. Cushing*, 38 Me. 527.

²⁵ *Bradley v. Morris*, Busbee (N. C.) 395.

if the facts be found in such or such a manner, they do, or do not, amount to probable cause; and if the judge leaves it to the jury to determine, not only whether the facts are true, but also whether, if true, they prove a want of probable cause, it is fatal error.²⁶ And it cannot go to the jury at all, unless the facts are doubtful.²⁷

Where suit was commenced on a protested bill paid before suit, and thereon an action of malicious prosecution was predicated, it was held a question for the jury to determine whether the plaintiffs in the first suit knew the bill was paid when they brought their action.²⁸

§ 292. The question of self-defence is intimately related to the subject in hand. And in a criminal case, whether the prisoner had reasonable grounds to apprehend danger of his life is a matter for the determination of the jury, when he slew the deceased.²⁹ And so the weight of threats.³⁰ And even if, afterwards, it appear that there was no danger, yet reasonable fear is a proper plea in defence.³¹ And the jury are to determine the necessary, and hence justifiable degree of force, in protecting property.³² But in Missouri, it seems that provocation is held a question of law, as to its sufficiency.³³ And so in the United

²⁶ *Bulkeley v. Smith*, 2 Duer (N. Y.) 261.

²⁷ *Masten v. Deyo*, 2 Wend. (N. Y.) 425.

²⁸ *Weaver v. Page*, 6 Cal. 684.

²⁹ *Goodal v. State*, 1 Oregon, 335; *Pfomer v. People*, 4 Parker (N. Y.) 558.

³⁰ *McPherson v. State*, 22 Ga. 486.

³¹ *Meredith v. Commonwealth*, 18 B. Mon. (Ky.) 49.

³² *State v. Clements*, 32 Me. 279.

³³ *State v. Jones*, 20 Mo. 64.

States Circuit Court of the first circuit (Mass.), unless it cannot be apprehended by the court, when a hypothetical instruction may be given, and the matter submitted to the jury.³⁴

CHAPTER XXI.

MISCELLANEOUS ITEMS.

I TAKE this chapter as a receptacle for the drift which has accumulated in our progress hitherto, consisting of items which did not seem appropriately to fit into any of the regular places, and yet which have a direct bearing upon the general subject, as important, in some instances, as almost any point that has passed in review. And being miscellaneous, we need not feel any particular solicitude concerning a logical order of arrangement.

§ 293. And so we will begin with the subject of minority. And what are necessities is held to be a question admitting no accurate definition, but dependent on circumstances. It is generally a question for the jury, but may sometimes be withheld from them, and pronounced upon authoritatively by the court. Where a boy seventeen years old was carrying on a farm for his mother, who was a widow and his guardian, and bought a pair of cattle which he and his mother kept for a while on the farm, and then exchanged for a horse to be worked in the farming

³⁴ U. S. v. Armstrong, 2 Curtis, C. C., 450.

operations, it was held that the question whether the purchase of the cattle was necessary ought to have been submitted to the jury.¹ The question of necessities, usually, is referred to this rather indefinite standard, whether articles furnished were suitable to the minor's estate and condition, and whether he is without other means of supply.² And it has been held a question of law for the court, whether certain articles for which an infant is sued are within the definition of necessities, and, if so, a question of fact for the jury to pass upon, whether those articles are adapted to the condition and wants of the infant.³ And one of the essential elements entering into such an inquiry is, whether he had a parent or guardian able and willing to support him.⁴

Where a boy, ten years of age, gets on a street railway car in motion, and the driver compels him to jump off while the car is moving at a dangerous rate of speed after the boy has remained thereon for a time, the company is liable if the boy used reasonable care, so far as possible under the circumstances, in getting off the car. And the question whether a boy of that age has sufficient capacity to take care of himself, is for the jury.⁵ And where, in such a case, it is claimed by the defendant that the act of the driver was not in the course of his employment, because forcible and malicious, and not merely negligent, and therefore defendant (the company) is not

¹ *Mohney v. Evans*, 51 Pa. St. 83.

² *Davis v. Caldwell*, 12 Cush. 513.

³ *Merriam v. Cunningham*, 11 Cush. 44.

⁴ *Swift v. Bennett*, 10 Cush. 437.

⁵ *Lovett v. R. R.* 9 Allen, 563.

liable, the defence will not avail; and the question whether the plaintiff was on the car as a passenger, and was pushed off, or was there without right and dropped off, is for the jury to decide.⁶

§ 294. The question of necessity, under the lateral railroad laws of Pennsylvania, as to the location of a proposed road, is held to be a question of law; the only question for the jury being that of damages.⁷

In estimating damages for the right of way for a railroad, it seems the jury may consider the necessity of the railroad building a culvert to preserve a necessary embankment on the land of claimant.⁸

§ 295. In the matter of performance and acceptance of work, the following case arose, which is thus stated in the syllabus of the reporter: "Where a contract for certain engines, pumps, and boilers, provided that plaintiff's engineer should be at liberty, at all times, to require the rejection of any work which he should deem inferior, and of any material which he might deem of improper or inferior quality or strength, and to require the substitution of other work and materials, and the contract further provided for the payment of advances as the work progressed, based upon the relative amount of the work furnished to the whole sum, and the principal contractors thereupon made a sub-contract, through plaintiff's engineer, with other parties, as to part of the work, according to drawings approved by plaintiff's engineer, and such work was subsequently accepted by said engineer as satisfac-

⁶ *Meyer v. R. R.* 8 Bosw. (N. Y.) 310.

⁷ *Brown v. Peterson*, 40 Pa. St. 373 (and see page 377).

⁸ *Nason v. R. R.* 4 R. I. 378

tory, but where the contract also provided that when completed the said engines, pumps, and boilers should perform a stipulated duty, and where, upon the trial of an action brought against the sureties of the principal contractors for the general non-performance of the contract, a conflict of evidence arose upon the following points: 1. Whether or not the principal contractors were improperly influenced by plaintiff's engineer in the award of the sub-contract to the sub-contractors; 2. Whether or not plaintiff's engineer, in order to bring about this award, agreed to be responsible that the sub-contractors would perform their work perfectly, and in full compliance with and satisfaction of the original contract; 3. Whether or not plaintiff's engineer, in all which he did in regard to the sub-contract, acted as the agent of the principal contractors; 4. Whether or not an interference took place by plaintiff's engineer with the sub-contractors, without the acquiescence of the principal contractors; and 5. Whether the acceptance of the work done under the sub-contract by plaintiff's engineer was an acceptance on behalf of the principal contractors, or on behalf of the plaintiffs; and if on behalf of the latter, whether it was an absolute one, or was for the sole purpose of making it the basis for an estimate for advances to be made under the original contract.

Held, that by such conflict of evidence clear issues of fact were raised for the determination of the jury, under proper instructions from the court.”⁹

§ 296. On a question of waste, it is held that cut-

⁹ *Water Commissioners of Detroit v. Burr et al.* 2 *Sweeney* (N. Y.) 25.

ting and selling trees is not waste, necessarily, in this country, as it is in England; that the condition of the land and requirements of husbandry in clearing lands must be considered, and that to what extent timber may be cut without waste, is a question of fact; as also whether cutting and selling timber is a violation of the stipulation in a bond that the defendant was to manage in a prudent and husbandlike manner.¹⁰

§ 297. Sometimes the question of ownership comes up for decision, as where different members of a stage company, or other corporation, by two bills of sale transfer the same property to two separate purchasers, and where the first was executed as a partnership sale, and the latter as the sale of property of which the vendor was absolute owner.¹¹ And where property was attached and delivered by the officer to a receiptor, who, on subsequent demand, refused to return it, on the ground that he had purchased it from the debtor before the attachment.¹² And whether a book said to contain assessments on unseated lands, found in an office occupied by the commissioners and treasurer, and requiring extrinsic evidence to identify it, belonged to the commissioners as an official record, validating the assessments.¹³ All these are for the jury.

§ 298. As to the duty of a parent, it is said that protection being a paternal duty, entire failure to extend it must be negligence. Generally, what is,

¹⁰ *Drown v. Smith*, 52 Me. 143.

¹² *Fitch v. Chapman*, 28 Conn. 261.

¹¹ *Western Stage Co. v. Walker*, 2 Iowa, 518-520.

¹³ *McReynolds v. Longenberger*, 57 Pa. St. 13.

and what is not, negligence, is a question for the jury. When the standard of duty is a shifting one, a jury must determine what it is, as well as find whether it has been complied with. Not so when the law determines precisely what the extent of duty is, and there has been no performance at all.¹⁴

And so, where one stands, in a special sense, *in loco parentis*, the question of excessive punishment may arise for the jury to determine; and it was held, in a certain case of indictment against a schoolmaster for an assault on a pupil, that it was not error for the judge to instruct the jury that the defendant was criminally liable for punishing a pupil only when he acted *malo animo*, or inflicted more punishment than necessary, and was not liable for error of opinion, provided he was governed by an honest motive in regard to the discipline of the school, and the interests of the child; and instruct them, instead, that, in punishment, the teacher must use reasonable judgment and discretion, and, as to modes and degrees of punishment, be governed by the nature of the offence, and the age and strength of the pupil; and left it to them to decide whether the punishment was excessive.¹⁵ And what is a proper instrument of punishment, is also for the jury.¹⁶ And it is held, also, that a teacher is not relieved from damages in a clearly excessive and needless punishment therein, by his good faith in inflicting it.

§ 299. As to family relationships, it is for the jury

¹⁴ Glassey v. R. R. 57 Pa. St. 174.

¹⁶ Lander v. Seaver, 32 Vt. 119.

¹⁵ Commonwealth v. Randall, 4 Gray, 38.

to say who is the head of a family, under the exemption law;¹⁷ and whether a certain woman is the widow of a deceased person.¹⁸ What constitutes an heir-at-law is a question for the court; but whether a deceased person died without children, and whether one is his oldest nephew, is for the jury.¹⁹ And the court must say who are the heirs of a deceased person.²⁰

§ 300. And a claim against an estate which is insolvent may, in Massachusetts, be passed upon by a jury, to determine what is the excess over the value of property mortgaged in partial security thereof.²¹ And, in Alabama, whether a claim has been duly presented to the executors, is also for a jury.²²

§ 301. Reasonable use is matter of fact; as, whether the use of a stream to carry off the waste of a manufactory; which is to be determined upon the circumstances of the particular case; as the size and character of the stream, for what purposes it is used, the extent of the pollution of its waters by the refuse, the benefit to the manufacturer, and injury to other riparian proprietors.²³ And, in determining the question, evidence showing the uniform custom of the country is admissible.²⁴ Also, where a jury were instructed that they were not to look alone at what would be a reasonable use at one mill, if there were no others

¹⁷ *Barnes v. Rogers*, 23 Ill. 352.

¹⁸ *Patchen v. Devin*, 37 Barb. 431.

¹⁹ *Ernull v. Whitford*, 3 Jones L. 476.

²⁰ *Bradford v. Erwin*, 12 Ired. (N. C.) 292.

²¹ *Trustees v. Cronin*, 4 Allen, 144.

²² *Executors v. Praytor*, 36 Ala. 694.

²³ *Hayes v. Waldron*, 44 N. H. 583.

²⁴ *Snow v. Parsons*, 28 Vt. 461.

on the stream, but to consider the wants of other mills likewise, it was held correct.²⁵

§ 302. In matters of public liability, as, for example, in New Hampshire, whether there would be such access to a bridge over a river by public highways as to make it of public utility, and, therefore, the town is subject to indictment for not building it, it is held a question for the jury;²⁶ although, in Connecticut, a joint liability of two towns for an injury occurring through want of repairs on a bridge over the line between them, and kept up by them together, was decided imperatively by the court; but it does not appear that there was any conflict in the evidence.²⁷ And in regard to pauper supplies, whether these were really furnished and received, has been held, in Maine, a mixed question of law and fact, to be decided by the jury, under instructions as to what would, or would not, constitute such furnishing and receiving, within the statute.²⁸ But it is held within the province of the jury to say whether the person receiving aid was a pauper, and stood in need of relief; and whether the overseers acted in good faith in advancing supplies; and whether these were judiciously applied.²⁹ If the assent of the other selectmen to the act of one of their number in furnishing supplies is presumed, the presumption is one of fact, and not of law.³⁰

²⁵ *Parker v. Hotchkiss*, 25 Conn. 331.

²⁶ *State v. Northumberland*, 44 N. H. 630.

²⁷ *Town of Tolland v. Town of Willington*, 26 Conn. 579.

²⁸ *Inhab. of Veazie v. Inhab. of Chester*, 53 Me. 35.

²⁹ *Moultonboro' v. Tuftonboro'*, 43 N. H. 318.

³⁰ *Burbank v. Piermont*, 43 N. H. 44.

§ 303. So of official liability; as where, in an action against a constable for returning an execution unsatisfied when the claim might have been collected, the question is for the jury whether the defendant in the execution had property enough to meet the demand; and it is held that the officer cannot avail himself of the plea that any of the property is exempt, since his duty was to levy, and leave the exemption to be claimed by the debtor, it being a statutory privilege, and purely personal.³¹ But this surely cannot be the law, where the statute points out the exemptions; for this implies a prohibition to the officer to levy on the property thus exempted.

§ 304. As to judicial proceedings, it is for the court to say whether a plaintiff is the real party in interest.³² But it seems strangely held, in New York, that, in an action against a sheriff for an escape, before a justice of the peace, the jury may be called upon to determine what were the circumstances of the issuing of a summons, as to whether a clerk, in filling out the summons, had any discretion left to him, so as to vitiate the issue, and that if the court decides, without submission to the jury, that the summons was lawfully issued, it will be a ground for reversal.³³ Also, it appears that a jury may find, where a record is silent, upon whose motion an order of court was made.³⁴ The issue of misnomer in abatement is held for the jury also.³⁵ An inference

³¹ *Baker v. Brintnall*, 52 Barb. 189. *Bockes, J.*, dissenting.

³⁴ *Creps v. Baird*, 3 Ohio St. 281.

³² *Williams v. Whitlock*, 14 Mo. 560.

³⁵ *State v. Marston*, 31 Me. 292.

³³ *Borrodaile, Sheriff, &c. v. Leek*, 9 Barb. 612.

from the conduct or silence of a party, under assertions, is, of course, a matter for the jury.³⁶

The correctness of the decision of a private arbiter is judicially presumed, and unless there is evidence of fraud or mistake, it is error to submit it to the jury.³⁷

In an attempt to reform by parol evidence of mistake a written instrument, it is for the jury to say what was proved, and for the court to say whether the facts found establish such a mutual misunderstanding as would make it a fraud to hold the parties to their writing.³⁸

So, what is an arrest is matter of law; but whether, in a particular case, an arrest was made, is a matter of fact, depending on intention.³⁹

§ 305. In an assault upon an officer attempting to attach a horse, where only one party participated, in the absence of the other, who came in after the affray was over, and the officer had left, and made some violent demonstrations, the question as to his joint liability was held appropriately left to the jury, who found him liable as a participant.⁴⁰

§ 306. On the trial of an indictment for seduction, the question as to the previous chaste character of the prosecutrix is a question of fact.⁴¹

§ 307. Whether the acts of a street commissioner are within the general authority conferred upon him,

³⁶ *Morrill v. Richey*, 18 N. H. 295.

³⁷ *Hudic v. Bilger*, 47 Pa. St. 66.

³⁸ *Schettiger v. Happle*, 3 Grant (Pa.) 55.

³⁹ *Journey v. Sharpe, Jones*, 4 L. (N. C.) 168.

⁴⁰ *Wakefield v. Fairman*, 41 Vt. 345.

⁴¹ *State v. Carron*, 18 Iowa, 373.

is a question of fact. And also whether a way is continuous, in deciding whether an injury had occurred on the same way where he had made repairs; to be inferred from other matters of fact, as the distance from the place where plaintiff was hurt to the place of repairs, the length of time the way has been used, the locality, whether in the city or country, and whether there are intersecting roads or streets.⁴²

§ 308. Whether revenue stamps have been cancelled, it seems, is a question of fact. And where a note has the full amount of stamps cancelled by initials, and fraud is charged against the note, it goes to the jury thereon.⁴³

And whether, where, under revenue laws, merchant appraisers are appointed to review the decision of public appraisers, the examination of samples drawn some weeks before their appraisal, was a substantial compliance with the law which required them to examine one package, at least, of every ten packages of goods, wares, and merchandise, is a question of fact.⁴⁴

§ 309. In an action of trespass against an officer, it is for the jury to decide whether he acted in good faith, believing himself to be acting in accordance with the statute.⁴⁵

And in trespass generally, it is a question of fact whether it was committed under circumstances of aggravation.⁴⁶

⁴² *Gilpatrick v. City*, 51 Me. 185.

⁴³ *Rees v. Jackson*, 64 Pa. St. 491.

⁴⁴ *Converse, Adm'r, v. Burgess*, 18 How. (U. S.) 416.

⁴⁵ *Tarlington v. Spencer*, 4 Hurl. & Nor. 859.

⁴⁶ *Hawk v. Ridgway*, 33 Ill. 475.

And where an action is brought for the value of a horse, which plaintiff claimed died of sudden fright from the explosion of a fire cracker under him, and the defendant claims died of the heat and over-driving, it is a question of fact what caused the animal's death.⁴⁷

§ 310. The pecuniary value of one person's life to another is not susceptible of precise proof; and in an action against a railroad company by an administrator, or next of kin, for the killing of the intestate, it is held to be for the jury; the court exercising only so far a supervision as to see that their verdict is not evidently the result of passion or prejudice.⁴⁸

§ 311. Where a judgment under an award is set up in defence as a bar to an action, it is for the jury to say whether the claim in suit was included in the award.⁴⁹

And whether a claim was objected to, or not, when rendered.⁵⁰

§ 312. In an action for damages for a failure to convey real estate, it is a question of fact whether the vendor acted in good faith therein, or wilfully neglected or refused.⁵¹

§ 313. Also the dedication of premises for a homestead; which is defined to be "the dwelling-place of the family, where they permanently reside. By the common law, such residence would raise the presumption that the premises so held were the homestead;

⁴⁷ Conklin v. Thompson, 18 Barb. 220.

⁴⁸ R. R. v. Shannon, Adm'r, 43 Ill. 347

⁴⁹ Cunningham v. Foster, 49 Me. 68.

⁵⁰ Field v. Ried, 21 Ga. 327.

⁵¹ Sweem v. Steele, 5 Clarke (Iowa) 356.

and every one would be bound to take notice of the character of the occupant's claim." ⁵²

§ 314. Whether particular persons are trustees of a religious corporation, is for the jury to determine, as to their capacity to sue to recover real estate of the society. ⁵³

And whether a private trust has been fulfilled; as where one, just before his death, away from home, delivered his money to another, to be paid over by the receiver to the family of the owner, and the trustee is afterwards sued by the administrator, on the ground that he had not fully accounted, it was held for the jury to determine whether the facts and circumstances proved that the deceased, at the time of his death, had more money in his possession than the defendant had accounted for, and whether or not there was sufficient *prima facie* evidence in the case against the defendant to call upon him to explain how it was that he received no more money from the deceased. ⁵⁴

§ 315. As to the sufficiency of the travelled path of a highway, it is a question of fact; and in a case where an action was brought against a town for an injury, and there was conflicting evidence as to the condition of the road, and the prudence of the plaintiff, it was held error in the court to charge the jury, as a matter of law, that the defendants were entitled to a verdict, if the travelled path was well beaten to

⁵² Cook v. McChristian, 4 Cal. 26.

⁵⁴ Eames v. Blackhart, 12 Ill. 196.

⁵³ Presbyterian Society v. Smithers, 12 O. St. 251.

such a width that the plaintiff might conveniently have passed at any specified distance from its margin at which the injury was received.⁵⁵

§ 316. The existence of a foreign corporation is matter of fact; and in this regard the states of the Union are foreign to each other.⁵⁶

§ 317. The variation of a compass in surveying, and the degree of it, are questions for the jury; and upon evidence concerning the degree, the court cannot properly decide that the evidence offered by one party is better than that offered by the other, in order to guide the jury in determining whether any, or what, allowance shall be made for the variation.⁵⁷

§ 318. It is held that where a receipt of a guardian is expressed to be in full of a ward's distributive share of an estate, the question whether the receipt is in full, or not, is for the jury.⁵⁸

§ 319. Also the diversion of trade, as in a case in New York, of which the following is the syllabus of the reporter: "The defendants, a manufacturing company, having a store of goods, agreed with the plaintiff to sell the same to him for a specified sum, a part of which was to be paid in cash, and the remainder in six, nine, and twelve months, with interest. It was also agreed that if the trustees of the defendants then in office should, within a specified time, cease to have the management of the defendants' business, and, by reason thereof, the general trade of the hands in the employ of the company should be diverted from the

⁵⁵ *Sessions v. Town of Newport*, 23 Vt. 11.

⁵⁶ *Lindauer v. Insurance Co.*
8 Eng. (Ark.) 461.

⁵⁷ *Harlan v. Brown*, 2 Gill (Md.) 481.

⁵⁸ *Binion v. Miller*, 27 Ga. 83.

plaintiff's store, and the plaintiff should sustain damage thereby, the defendants should pay him the sum of three hundred dollars, or discount the amount from any sum the plaintiff might owe the defendants. At the time of making this agreement, the affairs of the defendants were managed by a board of five trustees. Soon afterwards, three of the trustees resigned, and other persons were appointed in their places; one of whom was a merchant occupying a store adjoining that of the plaintiff, and who became the treasurer of the defendants. After his appointment, much of the trade of the hands in the defendants' employ went to his store. In an action to recover the three hundred dollars mentioned in the agreement, the plaintiff alleged that a majority of the trustees in office when he made his purchase, had ceased to have the management of the affairs of the company, and that, by reason thereof, the general trade of the hands in the employ of the company had been diverted from his store, and that he had thereby sustained damage. It was held that the agreement was valid and binding, and that it should have been submitted to the jury to determine whether the general trade of the hands had been diverted from the plaintiff's store; and if it had, then whether such diversion had taken place in consequence of the change in the board of trustees, and whether the plaintiff had sustained damage thereby; and that if the verdict were in favor of the plaintiff on all these questions, he would be entitled to recover the amount claimed as a deduction from the price of the goods." ⁵⁹

⁵⁹ *De Groff v. Linen Thread Co.* 24 Barb. 375.

§ 320. The question of the organization of a county, in order to determine whether attachments were levied within the jurisdiction thereof, is a question of fact.⁶⁰

§ 321. Whether there is an error in the record of a judgment, also.⁶¹

§ 322. And whether particular persons are members of an association in trade, and hence entitled to sue as such.⁶²

§ 323. In the estimation of damages where a railroad company is sued for the killing of a minor son, the jury are only to determine, as well as they can, the pecuniary value of his services during his minority, in Pennsylvania.⁶³ And in the absence of aggravation in trespass, compensation is the measure by which they are to decide.⁶⁴ Whether, in a particular case, the cutting of one hundred and eighty-two timber trees entitled the party to more than nominal damages, was held properly submitted to a jury.⁶⁵ Whether a party shall recover interest as damages, on breach of a contract to deliver merchandise, is also for a jury.⁶⁶ And whether any damage was sustained in an actual trespass or not.⁶⁷ Damages in official breach of duty, also.⁶⁸ Wherever an inquiry into fact is necessary in order to award damages, the court cannot assess,⁶⁹ unless on agreement of parties.

⁶⁰ *Craig v. Grant*, 6 Mich. 447.

⁶⁶ *Dana v. Fiedler*, 1 E. D.

⁶¹ *Weed v. Weed*, 25 Conn. 344.

Smith, 463.

⁶² *Smith v. Hollister*, 32 Vt.

⁶⁷ *Nicholson v. R. R.* 22 Conn. 74.

703.

⁶³ *R. R. v. Zebe*, 33 Pa. St. 330.

⁶⁸ *State, rel., v. Johnson*, 1 Carter (Ind.) 158.

⁶⁴ *Nagle v. Mullison*, 34 Pa. St. 52.

⁶⁹ *Weathers v. Mudd*, 12 B. Mon. (Ky.) 113.

⁶⁵ *Archibald v. Davis*, 4 Jones (N. C.) 138.

CHAPTER XXII.

EVIDENCE.

THE subject of evidence, being a general one, and so interwoven through the whole range of judicial proceedings, I have thought it appropriate to close up this first part of the present work with it, as a kind of connecting bond or clasp for the whole. A few of the items introduced here, necessarily involve a slight repetition of some things which have before been alluded to incidentally; yet here they will be more distinct, being set out directly in their immediate relations.

§ 324. In general, the competency of witnesses is to be determined by the court, without the aid of the jury. And where interest is a disqualification in a witness, the jury cannot reject the testimony of one who has been pronounced competent by the court, but whom they judge to be interested in the event.¹ And so the court is to judge whether a witness offered has sufficient capacity to understand the obligation of an oath, or the penalty for false swearing.² And a court cannot admit a witness, and then instruct the jury to disregard his testimony if they think him disqualified.³

But there is a striking exception in New Hampshire, where, in a doubtful case, it is held that the

¹ *Wickliffe v. Lynch*, 36 Ill. 211.

² *Duncan v. Welty*, 20 Ind. 44.

³ *Tabor v. Staniels*, 2 Cal. 240.

court has authority to refer the matter of disqualification on the ground of interest to the jury for determination.⁴

§ 325. Also, in general, the admissibility of evidence wholly depends upon the judgment of the court, according to nearly all the authorities. But there are exceptions to this, also. The court, in Maryland, holds, that where the preliminary proof is decidedly doubtful, it is proper to submit the matter to a jury to decide.⁵ And, in Kentucky, it is held that where the preliminary proof is not merely preliminary to the question of admissibility, but is otherwise material in the case, it may all go together to the jury; and particularly in the matter of written instruments.⁶ And evidence given in impeachment of a witness is always for the jury to determine upon. And it is held that what weight, if any, should be given to the statements of a witness who has been impeached by general evidence, or the uncontradicted statements of a witness whose testimony has been successfully attacked on some points by other witnesses, is a question for them; and that it is error to instruct a jury in a manner which assumes that there has been no impeachment of a witness, and that there is but one mode of impeaching a witness, namely, by evidence of general bad character.⁷

§ 326. The credibility of testimony belongs, on the other hand, to the jury, as their peculiar province; and on this there is no conflict of authority. And if

⁴ *Rich v. Eldridge*, 42 N. H. 156, and cases cited.

⁵ *Funk's Lessee v Kincaid*, 5 Md. 418.

⁶ *Swearingen v. Leach*, 7 B. Mon. 287.

⁷ *Terry v. State*, 13 Ind. 72.

there is but one witness to a material point in a case, and his evidence is self-contradictory, the jury have a right to reject it wholly.⁸ And if the jury credit a witness who is by the court considered unworthy of credit, it is no ground for a new trial.⁹ Nor are they obliged to believe a witness merely because he is not impeached by other witnesses.¹⁰ And the credibility of an accomplice, like that of any other witness, is a question for the jury; and they may convict on that alone.¹¹ And it is held also, that the maxim *falsus in uno, falsus in omnibus*, is subject to qualifications;¹² so that even wilfully false and corrupt testimony on a material point does not so discredit a witness absolutely, as to any other fact he may testify to, that, as matter of law, the jury are bound to disregard him in all;¹³ although, of course, they are authorized, in their discretion, to reject the whole in such case.¹⁴

And the judge cannot grant a nonsuit on his assumption that the plaintiff's witness cannot be believed.¹⁵

And whether a witness has impaired the credibility of his testimony by his manner in testifying, is also a question for the jury alone.¹⁶ And also, by an immoral and degraded life, and disregard to religious sentiment, and character and reputation.¹⁷

⁸ Strozier v. Carroll, 31 Ga. 557. Lyon, J., dissenting.

⁹ Newcomb v. State, 37 Miss. 406.

¹⁰ Coats v. Adm'r, 23 Tex. 613.

¹¹ People v. Jenness, 5 Mich. 330.

¹² Parsons v. Huff, 41 Me. 413.

¹³ Merrill v. Inhab. of Whitefield, 41 Me. 414.

¹⁴ Gillett v. Wimer, 23 Mo. 78.

¹⁵ Merritt v. Lyon, 3 Barb. 112.

¹⁶ Pierce v. Selleck, 18 Conn. 331.

¹⁷ Bowman v. Executor, 1 Strobb. (S. C.) 249.

§ 327. The particular weight of testimony, and of evidence, belongs mainly to the jury. But a judge may define the weight which the law attaches to a whole class of testimony, as, for example, that of accomplices;¹⁸ although he cannot single out certain testimony, and tell the jury that it is entitled to great, or little, weight.¹⁹ And it belongs to the court to estimate the legal effect of written evidence,²⁰ leaving the practical bearing to the jury. And the sufficiency of corroborative evidence to sustain the testimony of an accomplice, is for the jury on the general rule.²¹ And so whether any particular part of the evidence is weak or strong, even as regards a written instrument.²²

It is held that an unimpeached witness may be disregarded in estimating the sufficiency of testimony, because of his manner, or the inherent improbability of his statement, and that, too, when he is the witness of the party against whom the statement militates.²³

It has been held, also, that, it being for the jury alone to determine what amount of evidence is needful to produce conviction in their minds, it was an invasion of their province in the court to charge them that, in all civil cases, all that is required is, that the proof shall preponderate in favor of one party or the other; and that they must find according to the preponderance of the proof.²⁴ And to instruct that the

¹⁸ *Commonwealth v. Larrabee*, 99 Mass. 415.

¹⁹ *State v. Hundley*, 46 Mo. 422.

²⁰ *San Antonio v. Lewis*, 9 Tex. 69.

²¹ *State v. Cox*, 10 Iowa, 351.

²² *Keister v. Miller*, 25 Pa. St. 483.

²³ *Cheatham v. Riddle*, 12 Tex. 118.

²⁴ *Mays v. Williams*, 27 Ala. 272.

testimony of an accomplice is corroborated by the testimony of another witness.²⁵

§ 328. Dying declarations are declared to be "such as are made relating to the facts of an injury of which the party afterwards dies, under the fixed belief and moral conviction that immediate death is inevitable; without opportunity for repentance, and without hope of escaping the impending danger;" and are held to be admissible on the principle that "they are made in a condition so solemn and awful as to exclude the supposition that the party making them could have been influenced by malice, revenge, or any conceivable motive, to misrepresent; and when every inducement, emotion, and motive is to speak the truth, — in other words, in view of impending death, and under the sanctions of a moral sense of certain and just retribution."²⁶ And the admissibility is for the court, as other evidence.

There must be no doubt of speedy death; and so, where the declarant said she knew she must die, but if she lived to get well, &c., the declarations uttered were held inadmissible.²⁷

It is held, in Georgia, in exception to the general rule, that when a *prima facie* case is made out, the evidence may go to the jury to be passed upon as to whether or not the declarations were made in immediate prospect of death.²⁸ And, in New Jersey, *ut infra*.

It appears that dying declarations may be brought

²⁵ Noland v. State, 19 Ohio, 131.

²⁷ State v. Center, 35 Vt. 385.

²⁶ Starkey v. People, 17 Ill. 21, and cases cited.

²⁸ Campbell v. State, 11 Ga. 376.

in as secondary evidence, where prior written declarations sworn to before a magistrate have been lost, or become unavailable.²⁹ And where the dying declarations themselves have been reduced to writing, the writing must be produced as the best evidence, when duly authenticated.³⁰

The weight of the declarations as testimony, when introduced, belongs to the jury; and depends upon a variety of circumstances, which may tend to increase or diminish it, as the mental and physical condition of the sufferer when the declarations were made, his memory, the nature and extent of the disease, and the accuracy with which they appear to have been reported by the witnesses.³¹ It is held, in New Jersey, that, notwithstanding declarations may have been admitted by the court as dying declarations, the jury are authorized to reject them, should their opinion be that they were not made under the apprehension of impending death.³² It seems, that if leading questions are asked, and the dying person, unable to speak, gives a sign in affirmation, as by squeezing the hand of the questioner, it is competent to go to the jury to be weighed by them.³³

§ 329. Where evidence is all one way, so that there is no conflict therein, the case is not to be given to the jury, according to nearly all the authorities; although it is held the other way in Maryland and Iowa.³⁴ And it is held that even the issue of negli-

²⁹ *People v. Glenn*, 10 Cal. 36.

³⁰ *Collier v. State*, 20 Ark. 45.

³¹ *Lambeth v. State*, 23 Miss. 358.

³² *Donnelly v. State*, 5 Dutch. 503.

³³ *Commonwealth v. Casey*, 11 Cush. 421.

³⁴ *Oleson v. Henrickson*, 12 Iowa, 222; *Birney v. Telegraph Co.* 18 Md. 341.

gence comes within the rule;³⁵ and that to act otherwise is to submit to the jury a question of law, and deprive the defendant of his right to have the judge determine the law.³⁶

Where, however, there is any substantial proof, it must go to the jury, however strong or persuasive may be the countervailing evidence;³⁷ although, in the latter case, it appears the court may express an opinion upon it.³⁸

§ 330. As to the meaning of a witness, the Supreme Court of Vermont remark, "It would be a noticeable innovation if it should now be held that the court could not lawfully state to the jury his impressions and understanding as to how a witness meant to be understood, in the testimony he had given, when some question had arisen on that subject, and indicate how such impression and understanding were derived."³⁹ But when a witness states that he has an impression as to the matter of inquiry, it is competent evidence, if he means that he has some recollection, however slight, founded on his personal knowledge, and the jury are to determine whether such is his meaning, unless it is apparent to the court from the subject of his testimony, and his other statements in connection with it, that he does not intend so to be understood.⁴⁰

§ 331. Where the evidence of a foreign law con-

³⁵ *Dascomb v. R. R.* 27 Barb. 222.

³⁶ *Carpenter v. Smith*, 10 Barb. 663.

³⁷ *Express Co v. Will*, 64 Pa. St. 201.

³⁸ *Dougherty v. Stevenson*, 20 Pa. St. 210.

³⁹ *Missisquoi Bank v. Evarts*, 45 Vt. 299.

⁴⁰ *State v. Flanders*, 38 N. H. 332.

sists entirely of a judicial opinion, the question of its construction and effect is for the court.⁴¹

The materiality of a fact in a prosecution for perjury is a question of law.⁴²

And whether the proposed testimony of a wife would lead to a violation of marital confidence.⁴³

And whether the records and papers offered in evidence to prove the legal establishment of a road, are sufficient.⁴⁴

And evidence of the loss of a subscription book or other document, preparatory to the admission of secondary evidence.⁴⁵ And of a written contract, bond, or note.⁴⁶

And the question of variance between the pleadings and proof, in slander.⁴⁷ And in other cases; and in regard to written evidence.⁴⁸

And whether a verdict rendered was manifestly found from prejudice, bias, or improper influence, or a mistake of law or fact.⁴⁹

§ 332. The jury must find on evidence, and are not, in any instance, to act as "amicable compounders."⁵⁰ But in actions of trespass, they may sometimes view the premises; but, it is said, not to "base their verdict on such examination, or become silent

⁴¹ *Kline v. Baker*, 99 Mass. 253.

⁴² *State v. Williams*, 30 Mo. 367.

⁴³ *Cook v. Bennett*, 51 N. H. 85.

⁴⁴ *State v. Prine*, 25 Iowa, 232.

⁴⁵ *Graff v. R. R.* 31 Pa. St. 493.

⁴⁶ *Glassell v. Mason*, 32 Ala. 719.

⁴⁷ *Birch v. Benton*, 26 Mo. 154.

⁴⁸ *Oxley v. Storer*, 51 Ill. 159.

⁴⁹ *West Gardiner v. Farmingdale*, 36 Me. 252.

⁵⁰ *McWilliams v. Town of Plaquemine*, 19 La. An. 74.

witnesses, as to facts in relation to which neither party has an opportunity to cross-examine; but only to enable them the better to apply the testimony disclosed on the trial.”⁵¹

It is their province to determine which of two papers is a copy of a certain instrument of writing.⁵²

And the identity of an article specified in a contract.⁵³

And they may consider the non-production of a writing shown to be in the hands of a party who has been duly notified to produce it.⁵⁴

And where what was said at a particular time in the hearing of the party is put in evidence, it is for the jury to construe his silence or conduct at that time, and draw such inference as they judge proper.⁵⁵

And whether an estoppel is proved;⁵⁶ as whether, by agreement, a party is estopped from claiming damages.⁵⁷

§ 333. Whether any inducements were held out to procure a confession from a person charged with crime, is for the court to determine on the question of admissibility.⁵⁸ And this evidence of confessions is held to be of a low grade at the best, and not necessarily even *prima facie* evidence of the fact to which they relate.⁵⁹

⁵¹ Close *v.* Samm, 27 Iowa, 508.

⁵² Holbrook *v.* Nichol, 36 Ill. 163.

⁵³ Pollen *v.* Le Roy, 30 N. Y. 554.

⁵⁴ Tobin *v.* Shaw, 45 Me. 349.

⁵⁵ Morrill *v.* Richey, 18 N. H. 299.

⁵⁶ Brown *v.* Bowen, 30 N. Y. 541.

⁵⁷ Litchfield *v.* Garratt, 10 Mich. 427.

⁵⁸ Fife *v.* Commonwealth, 29 Pa. St. 429.

⁵⁹ Stephens *v.* Vroman, 18 Barb. 257.

§ 334. The declarations of a father as to the maternity of his child are held competent evidence, to be estimated by the jury.⁶⁰

§ 335. It is held that a jury "have the right to draw from proven or known facts such inferences and considerations as their power of reason and general experience teach them to be the usual or necessary consequence thereof; and, in so doing, to bring to their aid their experience of the motives that govern human action generally, or of human action under the peculiar circumstances of the case before them; and also their experience in the daily transactions of life, including necessarily their experience — if they have any — in transactions of the nature of the one out of which the cause before them may have arisen."⁶¹

⁶⁰ United States *v.* Sanders,
Hemp. (U. S.) 483.

⁶¹ *Herst v. De Comeau*, 1
Sweeney (N. Y.) 608.

PART II.

ON THE LAW OF INSTRUCTING AND CHARGING JURIES.

CHAPTER I.

NATURE OF INSTRUCTIONS.

§ 336. THE province of instructions from the court is to inform the jury what the law is, connected with the case in hand, and show them how to apply it to the particular facts involved. It always embraces both these particulars. And so where, in a quasi criminal case, the court gave an instruction as to the general rule of law relating to self-defence, but showed no application thereof to the case on trial, it was judged erroneous, and the Supreme Court remarked thereon, "The charge, as given, informed the jury what 'the great principle' of the law of self-defence is, and correctly; but that was not all to which the defendant was entitled. It is not for juries to apply 'great principles' to the particular state of facts found, and thus make the law of the case. When the facts are admitted, or proved and found, it

is for the court to say what the law, as applicable to them, is, and whether or not they furnish a defence to the action, or a justification for the injury, if that be the issue. And so, where evidence is offered by either party to prove a certain state of facts, and the claim is made that they are proved, and the court is requested to charge the jury what the law is as applicable to them, and what verdict to render, if they find them proved, the court must comply."¹ And it is a matter of great importance, to begin with, that juries should be really instructed, and not embarrassed or confused, by a charge of the court as to the law.² And in Iowa it is held that a judge's duty is, even without a request of the parties, to give a clear and intelligible view of the law; and the court say in a particular case, "It was most undeniably one in which there should have been clear instructions to the jury as to the law governing it, and the rights of the parties. To submit it to the jury without any directions to guide them, from the court, would be to reach a result almost as uncertain as the toss of a copper or the throw of dice. It may be said that the counsel did not request instructions, and that therefore it was not obligatory on the court to give any. Such a view does not accord with our conceptions of the functions and duty of the judge. He should see that every case goes to the jury so that they have clear and intelligent notions of precisely what it is that they are to decide. His charge is their chart and compass."³

¹ *Morris v. Platt*, 32 Conn. 82.

³ *Owen v. Owen*, 22 Iowa,

² *Balt. & O. R. R. v. Resley*, 274.

14 Md. 442.

§ 337. The charge should be strictly confined to the law, and not comment on the evidence, nor determine what facts are or are not proved;⁴ unless where there is no conflict of evidence, and the fact is admitted or undisputed, in which case a direct instruction may be given, because then the whole becomes a question of law,⁵ and "there is no reason or authority for requiring a court to throw doubt on a certainty in charging a jury, for this would tend to mislead and confuse, rather than to instruct, and multiply what are called the uncertainties of the law." However, where there is a conflict of evidence, instructions are not to be deemed erroneous merely because they do not include every possible, or even available, aspect of the law applicable to the case.⁶ And where the charge is correct as far as it goes, but does not cover the whole ground, it is the duty of the parties to ask additional charges, if they desire it.⁷ And a judge is bound to instruct simply as to what the law is, and not as to its history, object, or purposes; or give an exposition of its reasons.⁸ And, indeed, such exposition would frequently be improper; as where the court was requested to embody in an instruction the reasons given by Greenleaf, in his work on Evidence, why confessions or admissions ought to be received with great caution.⁹

§ 338. But it is held not allowable to give in charge

⁴ *Russ v. Steamboat*, 9 Iowa, 375.

⁵ *Wisner v. Davenport*, 5 Mich. 504.

⁶ *Linn v. Wright*, 18 Tex. 340.

⁷ *Farquhar v. Dallas*, 20 Tex. 200.

⁸ *Lincoln v. Wright*, 23 Pa. St. 81.

⁹ *State v. Turner*, 19 Iowa, 148.

to the jury certain specified sections of a law. And in a case where this was requested, the court said, "Apart from the statute which directs in what manner instructions may be asked, and does not sanction the mode proposed, the manner of asking the instructions, in this instance, was novel and unprecedented, and was calculated to create the apprehension that counsel desired rather to bewilder and mislead than to enlighten the jury as to their duty. With equal propriety might counsel have asked of the court to give in charge to the jury the entire law, or volume of laws, in which the provisions referred to were contained."¹⁰ It is not objectionable, however, that a charge gives a definition in the very words of the statute, but it is proper to follow it up with an explanation of its legal meaning and effect. And so, in a case where a statement of what constitutes a sufficient testamentary capacity was given in the terms of a particular act, and the judge added such an explanation, it was on objection held correct.¹¹ But a court is bound to charge, when requested, in conformity with a particular statute; and where a request of this kind was made, embracing the provision of a statute in substance, and was refused, and the counsel then handed the judge the volume of printed statutes, and requested him to charge the jury on a specified section, which was also refused, the case was reversed on that ground.¹²

§ 339. And while the application of the law is also

¹⁰ *Ryan v. Jackson*, 11 Tex. 403.

¹² *Benedict v. Hoggin*, 2 Cal. 386.

¹¹ *Calvin v. Warford*, 20 Md. 388.

to be pointed out by instructions, yet this gives the judge no right to draw inferences of fact, as well as presumptions of law.¹³ And although a mere expression of opinion of the judge as to an inference from fact does not always and necessarily form a ground for exception, yet if he instructs them in regard to such an inference in such a way that the jury may well understand that the inference is matter of law, which they are not at liberty to disregard, it is error.¹⁴ But the general and better rule is, that a judge should avoid all forms of expression which would even intimate his opinion on any question of fact.¹⁵ And even in a mixed question of law and fact.¹⁶

But this rule does not prohibit illustrations in charging, drawn from external facts. And where an objection was, that the judge, in his charge, narrated a recent incident of a like character with the one on trial, which had happened in his own neighborhood, and that this was likely to impress the minds of the jury improperly, the court remarked thereon, "The objection is substantially that the judge stated a fact which had not been sworn to on the trial. But it was not stated as a fact belonging to the case, and was presented only for the purpose of illustration. This is a common practice in our courts. No intelligent juror can be deceived by such illustrations. And whether the judge, in commenting upon the facts of the case, has made use of too strong language, or has

¹³ *Easterling v. State*, 30 Ala. 48.

¹⁴ *State v. Lynott*, 5 R. I. 295.

¹⁵ *Riviere v. McCormick*, 14 La. An. 139.

¹⁶ *Pettingill v. Porter*, 5 Allen, 1

gone too far in using, by way of illustration, historical or personal incidents of a kindred character to those on trial is not for us to say. He has a right to illustrate his views as he pleases, and a rule requiring that a rigid criticism should be applied to such expressions would impose upon the judge an unreasonable restraint, and lead to great inconvenience.”¹⁷

§ 340. And it has been held not to be error for a judge in charging the jury, after correctly instructing them upon all the points presented by counsel, to add that it was the fairest and best way for the jury to consider and determine the case mainly upon the grounds which had been taken and discussed by the counsel in the argument.

§ 341. Nor does the expression of an opinion of the judge against the policy of the law vitiate an instruction; as where the charge was, that the jury were in a criminal case the judges of the law, as well as the facts, and the judge remarked, “I will charge you, gentlemen of the jury, that that is the law of this case, that it is the law of the State of Louisiana, as decided by the Supreme Court, though, in my opinion, it is bad law,” and objection was made to it as calculated to prejudice the case, the Supreme Court said, “It is now contended that the verdict should be avoided on account of the remark of the judge, that the law, as he understood it to have been decided by this court, was ‘bad law.’ We do not think so. Assuming, what is not strictly correct, that this court has ever said that it would be right to tell a jury that ‘they are judges of the law and fact

¹⁷ *Masters v. Town of Warren*, 27 Conn. 300.

in a criminal case,' without adding any explanation as to the relative provinces of the court and jury, we cannot perceive that the prisoner is prejudiced by the district judge's expression of his personal opinion that this law was 'bad law;' for he at the same time told the jury that, whether good or bad, it was the law of the case before them, which was as much as to tell them that his personal opinion of the correctness or policy of the law should not weigh with them, but they must take the law as expounded by this court.

"But we think the learned judge misapprehended the opinion of this court, and, by the unqualified charge he gave, conceded more to the prisoner's counsel than was necessary. We have said that 'in criminal as in civil cases the jury are judges of the law, as well as of the facts, but not in precisely the same sense. They are the exclusive judges of the facts; they are subordinately judges of the law; because a general verdict of 'guilty' or 'not guilty' requires a decision upon both law and fact. But it would be absurd to require the judge to instruct the jury in the law governing the case, and then say they may pay no heed to it, if it suits their caprice to overrule it; it would be absurd to allow the prisoner to except to the charge of the judge, and ask this court to reverse a verdict of guilty merely because the judge erred in his charge, if, under the theory of our law, a charge by the court was nothing more than an argument of counsel, to be heeded or not by the jury, as it happened to strike their judgment. The jury should listen attentively and respectfully to the

law as expounded by the court, because they are expected to apply the law, as thus expounded, to the facts which they may find. They are not under a compulsion to take the instructions of the court as law, but they are expected to do so, and it must be an extraordinary case indeed where they would be justified in disregarding the instructions of the judge, who sits indifferent between the state and the prisoner, the authorized expounder of the law. If the jury assume to interpret the law in opposition to the charge of the judge, there is no remedy, even if justice be outraged thereby; if they heed the instructions, and the instructions are right, justice is done; if they are wrong, and prejudicial to the prisoner, he has his remedy by a bill of exceptions, and an appeal. We think some such explanation as this should be added when a court instructs a jury that they are judges of the law and the fact.”¹⁸

I have been unwilling to divide this long extract because, although it departs from the specific topic of this section, it bears directly upon the subject of the present chapter.

§ 342. It is the duty of the court to present to the jury the substantial issues in a cause, so that it has been held error to read the whole declaration, both material and immaterial allegations, and then instruct the jury that if they find “these statements” sustained by proof, they should find for the plaintiff, since the court should separate the material from the immaterial statements, and present to the jury only the real, substantial issues.¹⁹ It is no part of the duty of a jury,

¹⁸ *State v. Scott*, 12 La. An. 386.

¹⁹ *McLean v. Clark*, 47 Ga. 24.

nor, indeed, have they any right, to determine from the pleadings what is admitted and what denied. It is the province of the court alone to examine the pleadings, and if any of the allegations are to be taken as true, for want of the necessary denial, to state it so to the jury.²⁰ An instruction, also, may be confined to a single issue among many; if the decision upon it will settle the case. And where an objection was made in such a case, the court remarked, "Such directions are not only frequently convenient in practice, but they conform to the usages in the English courts, where it is not infrequent for the judges to stop the general course of a trial, and to direct a finding upon some matter which, decided in a given way, is conclusive of the case on the merits. It would be a useless consumption of time to proceed to hear and try various issues and matters in dispute, when the decision of one fact is conclusive of the whole case on the merits."²¹ And, indeed, in any case, it is held that the mere omission of a court, in a charge, to give instructions on all the points involved, is no ground of objection, where a party did not request any further charge.²²

Yet nothing which falls short of giving a jury distinct ideas as to material and immaterial allegations, and of the issues actually formed, is to be regarded as a sufficient charge. And so an instruction, which asserted that "every fact material to the matters in issue, which is stated in defendant's answer, so far as

²⁰ *McKinney v. Hartman*, 4 Iowa, 155; *Reid v. Mason*, 14 Ind. 542.

²¹ *Broadus v. Nelson*, 16 Cal. 81.

²² *Express Co. v. Kountze*, 8 Wall. 354.

it sets up a counter claim against plaintiff, and which is not denied by plaintiff's answer, the jury are bound to receive as true," was condemned as erroneous.²³

§ 343. On much the same principle, the mere reading of decisions from reports is to be condemned as being merely indefinite in application; although, to be sure, the decisions are to be regarded as correct in law. Thus, where a case was reversed for the exclusion of evidence, and on the next trial the judge read the opinion of the Supreme Court to the jury, and submitted the case thereon, it was held that the submission was error, although the judge had subjoined to the reading of the opinion the remark, "Reading to you the evidence in the case, which does not in any substantial particular vary from what it was on the former trial, it is our plain duty to submit it to you under the instructions of the Supreme Court as I have detailed them to you;" and then proceeded to give some detailed instructions as to the facts, — the effect of the whole charge being to lead the jury to believe that the case was precisely that upon which the Supreme Court had passed before, even with the evidence formerly excluded.²⁴ Although it is not improper to employ the language of the higher court in its specific application to the case in hand.²⁵ And it is even held error to refuse to do it when so requested.²⁶

But the whole practice of reading books to the jury

²³ *Tipton v. Triplett*, 1 Met. (Ky.) 571.

²⁴ *Dimes Savings Inst. v. Alento'vn Bank*, 61 Pa. St. 395.

²⁵ *Hood v. Hood*, 25 Pa. St. 417.

²⁶ *Pugh v. McCarty*, 44 Ga. 383.

is quite vigorously condemned in Vermont; and the court remarked, in a criminal case, that "One might almost as well, for any purpose of actual enlightenment, give the jury a general treatise upon criminal law, and tell them the whole law applicable to the case would be found under the title homicide, or manslaughter and murder."²⁷ And, in Alabama, where a judge said to the jury who asked further instructions, "I perceive from your questions that your minds have been misled by the case that was read," and then stated to them that they should receive the law from the court, that counsel often read books to the jury to explain themselves more clearly and forcibly, but that they must not receive them as law, only so far as they were sanctioned by the court, it was held no error.²⁸ And, on the other hand, where, in a railroad case, the judge read the entire syllabus of another railroad case, and told the jury that that syllabus was the law of the case, it was held erroneous.²⁹ And it is also held, that, on the trial of a criminal prosecution, the court may properly refuse to permit counsel to read law-books to the jury.³⁰

§ 344. A charge consisting of several paragraphs may be construed together as one where the paragraphs are consecutively numbered. And if such a charge, taken as a whole, is applicable to the testimony as a whole, it is held not erroneous, because certain paragraphs omit to note portions of the evidence when the evidence so apparently omitted is

²⁷ *State v. McDonnell*, 32 Vt. 535.

²⁸ *Chamberlain & Co. v. Masterson*, 26 Ala. 371.

²⁹ *Stucke v. R. R.* 9 Wis. 202.

³⁰ *Murphy v. State*, 6 Ind. 490.

properly brought to the notice of the jury in other paragraphs of the charge, and the charge as a whole is a proper declaration of the law applicable to the whole testimony.³¹ And so, where a prayer for an instruction contains an apparently independent proposition, and another more definite and substantial one predicated on the facts submitted in the other portion for the finding of the jury, they should be considered together as one proposition, when they are properly connected.³² And if there be a series, and part erroneous, but the error is corrected in another part, the whole will be sustained.³³ Nor has a judge the right to refuse a series of instructions merely because they are unnecessarily numerous and lengthy.³⁴

§ 345. An objection apparent on the face of the pleadings cannot be raised for the first time by an instruction, after a trial on the merits. It is the duty of parties to take advantage of such an objection by means of a demurrer.³⁵

§ 346. Where a request is an entire proposition made in reference to the plaintiff's right of recovery, and not in reference to damages, and is properly denied, it is not error for the court to omit to single out a particular part of it and apply it upon the question of damages, if in the charge given there is no affirmative error as to the assessment of damages.³⁶

§ 347. It is not held improper for a judge to cau-

³¹ *Hawkins v. Hudson*, 45 Ala. 482.

³² *Parkhurst v. R. R.* 19 Md. 473.

³³ *State v. Robbins*, 3 Jones L. (N. C.) 250.

³⁴ *McCaleb v. Smith*, 22 Iowa, 242.

³⁵ *Young v. Broadbent*, 23 Iowa, 539.

³⁶ *Whittaker v. Perry*, 38 Vt. 114.

tion a jury against false sympathy in a criminal case, in even strong language; as where the charge was that they must "render a fair and honest verdict. If they had a reasonable doubt as to the guilt of the prisoners, it was their duty, under the obligations they had taken, to render a verdict accordingly; but if they were satisfied beyond reasonable doubt, upon the law and evidence, that the prisoners were guilty, and from any false sympathy rendered a verdict of not guilty, that the law said they were perjured men;" the instruction was sustained.³⁷

§ 348. And an instruction urging the jury to agree is held proper; as where the court suggested that the case at bar had been twice tried, and that it was important that they should agree if they could satisfy their minds as to the right of the cause between the parties;³⁸ although, in a criminal case especially, great caution is requisite. And where a jury, being out a long time, came into court for further instructions, and the foreman stated that there was little probability of their ever agreeing, and asked that they be discharged, and the court refused, saying that he "considered it his duty to keep the jury longer, in view of the fact that the prisoner was charged with the commission of the highest crime known to the law, and that the security of the lives of the people required, as well as the interests of the prisoner, that the jury should not be discharged until every effort had failed, and there was no probability whatever that the jury could agree, and that before the next term

³⁷ *State v. Fulkerson*, Phill. L. (N. C.) 233.

³⁸ *Niles v. Sprague*, 13 Iowa, 198.

of the court the witnesses might be in their graves, and justice cheated of its victim," it was held improper as indicating the opinion of the court that the prisoner was guilty.³⁹

§ 349. It is held that the court may keep up communication with the jury as well for withdrawing erroneous instructions, as for giving additional when needful; although, if erroneous instructions are given in writing, and taken by the jury to their room, they are not to be withdrawn through the bailiff, after adjournment for the day, and in the absence of the parties.⁴⁰

§ 350. In Wisconsin, it is held that answers to casual questions by jurors do not come under the definition of a charge, within the meaning of the statute; as where a jury asked whether the plaintiff had a right "to use the defendant's divided grain to feed the stock and sheep," and the judge replied that by law he would not have the right; the court remarking that the word charge, in the statute, was not intended to include every question and answer passing between the court and jury.⁴¹

³⁹ *Fisher v. People*, 23 Ill. 294.

⁴¹ *Millard v. Lyons*, 25 Wis.

⁴⁰ *Hall v. State*, 8 Ind. 440. 516.

CHAPTER II.

MODE AND TIME OF GIVING INSTRUCTIONS.

§ 351. IN general, instructions or charges are given in response to requests or prayers of parties, or rather counsel, with some modifications to be hereafter noted. And the general rule is pretty clearly stated by the Court of Errors and Appeals, in Mississippi, in expounding the statute, thus: "Any judge before whom any issue of fact is tried, shall charge the jury only upon contested questions of law applicable to the issue, and at the request of one of the parties, or their counsel, distinctly specifying, in writing, the point of law in regard to which the instruction is asked."¹ And a request must be made in such a form that the judge may properly charge in its terms as made, without qualification, or otherwise his refusal will not be held error.²

§ 352. There is some variation of practice in regard to deviating from the exact language of the request; but the general rule is, that, if an instruction be given substantially as requested, it is sufficient; and sometimes the court may materially modify it, or even reverse it, or substitute its own charge, or even charge on its own motion. We will consider here a few particulars, to illustrate this matter.

¹ Williams v. State, 32 Miss.
397.

² Bagley v. Smith, 10 N. Y.
499.

The Alabama code (§ 2355) is quite rigid in this regard, as it imperatively requires that a charge, if correct and applicable, must be given in the language in which it is asked; and the doctrine of error without injury, cannot be applied to a refusal of such charge, and that, too, although the legal proposition embraced in it was substantially enunciated in another charge given by the court.³ But this, of course, is subject to the conditions that the request states a correct legal proposition, and has no tendency to mislead; and if the judge is apprehensive that it places any particular phase of the case in undue prominence before the jury, it is held that he may and ought to supplement it by an additional explanatory charge, to guard against such tendency to distort the case.⁴

In New York, it is held, that, where propositions are submitted to the court, with a request that they be given as instructions to the jury, and are charged in all their just sense and meaning, it is no ground for setting aside the verdict that the judge did not adopt the very words of the request, it being enough that the instructions, given clearly and intelligibly, embrace the whole rule on the subject.⁵

In Iowa, on the very contrary, the court has strongly expressed a disapproval of the whole practice of allowing counsel to instruct the jury by requests, and declare that "The better practice, as a general rule, is for the judge to put aside the instructions asked by the respective counsel, and cover the whole ground

³ *Polly v. McCall*, 37 Ala. 21.

⁵ *Williams v. Birch*, 6 Bosw.

⁴ *Bell's Adm'r v. Troy*, 35 Ala. 186.

of the controversy in a corrected and methodical charge of his own, stating the questions of fact to be decided, and the law applicable thereto, under the issues and the evidence.”⁶ And, also, it is declared to be proper where the court does give instructions asked to append a note thereto, directing that they shall be considered with other instructions given by the court.⁷

In Maine, it is held not to be a matter of right with counsel to have the charge in the exact language of the request, but only that the request be substantially given.⁸

And so, in New Hampshire, no objection can be made for variation, if the exact language was not called for by the facts, and the charge was sufficiently favorable to the objector.⁹ And, in North Carolina, substantial compliance is all that is requisite.¹⁰ And in Minnesota;¹¹ and the court can modify the requests.

But it is the other way in Mississippi.¹²

In Illinois, it was held, in 1859, that requests are not strictly necessary. The court say, “Courts are created and established for the administration of justice, and all legal and proper means should be employed for the attainment of that end. And how it can be error for the court to instruct the jury as to the law of the case, whether asked to do so or not, we are at a loss to conjecture. We have been referred to no authority that so holds, and we cannot imagine

⁶ *State v. Collins*, 20 Iowa, 91.

¹⁰ *Marshall v. Flinn*, 4 Jones L. 199.

⁷ *State v. Pitts*, 11 Iowa, 343.

¹¹ *Dodge v. Rogers*, 9 Minn. 228.

⁸ *Treat v. Lord*, 42 Me. 553.

⁹ *Clark v. Wood*, 34 N. H. 447.

¹² *Cotton v. State*, 31 Miss. 504.

that such can exist. One of the very objects of having a judge is to instruct the jury on the law applicable to the case. Instead of its being error for the court on its own motion to instruct where it seems to be required by the justice of the case, it is rather the duty of the judge to give such instructions. The instruction given by the court in this case, without being requested by either party, we think, embraced the law as applicable to the case, and it is not denied that it does. And we have no hesitation in saying, that, so far from its being error, the court acted in strict conformity with the duty imposed by the oath of the judge and the requirements of the law.”¹³ But the statutes of the state now seem at least to bear very hard against the doctrine herein enunciated.

In Indiana, the court is bound to instruct the jury, unless the parties consent to dispense with instructions.¹⁴

In Maryland, where an instruction is granted by the court, after the rejection of prayers offered by counsel, it is defective, unless it declares the law upon the points raised by the counsel, in terms explicit and intelligible to the jury.¹⁵ And the general rule is stated by the court thus: “It may be proper to grant or refuse prayers in the terms in which they are presented, and for the court to reject them all, and instruct the jury in their own words, or grant the prayers, with such explanations or qualifications as may be necessary to a proper understanding of the

¹³ *Stumps v. Kelley*, 22 Ill. 141.

¹⁴ *Welch v Watts*, 9 Ind. 115.

¹⁵ *Fells Point Savings Inst. v. Adm'r*, 18 Md. 321.

case; but it must appear, from the instruction given, that full and substantial justice has been done to the parties, by declaring the law accurately, and in terms explicit and intelligible to the jury, upon the points raised by the counsel.”¹⁶ And where the court cannot grant the entire prayer as made, although a portion of it might have been given in separate distinct forms, the whole may be rejected.¹⁷

The same is held in California, to the effect that, where an instruction, if given entire, would be erroneous, the court is not bound to separate the concluding clause, and give that by itself.¹⁸

In South Carolina, where there is no request, error cannot be assigned as to the omission of the judge to charge the jury on certain propositions of law.¹⁹

And so, in Pennsylvania, the court will not reverse a cause because of an omission at the trial to instruct the jury on a material point in the cause, if the attention of the court below were not called to it by the counsel.²⁰ And it is held, in that state, that, where the points presented to the court below are fully answered in a general charge to the jury, it is sufficient, without a separate and detached response to each; and, when this is done, those which are not answered are to be considered as negatived by the court.²¹

In Virginia, where a party asks for an instruction, which is in itself proper to be given, it must be given

¹⁶ *Snively v. Fahnestock*, 18 Md. 396.

¹⁷ *Birney v. Tel. Co.* 18 Md. 342.

¹⁸ *Smith v. Richmond*, 19 Cal. 477.

¹⁹ *Madsden v. Ins. Co.* 1 S. C. 24.

²⁰ *Newman v. Edwards*, 34 Pa. St. 35.

²¹ *Arbuckle v. Thompson*, 37 Pa. St. 170.

as asked, although in part it is based upon an assumption not sustained by the evidence; and even if an instruction asked is equivocal, being correct in one construction, but incorrect in another, it should not be refused, if by so refusing the jury would be misled; but should be given with an explanation giving it the proper meaning.²² And it is error to substitute an instruction which, though stating the law correctly, yet is long and complicated, calculated to mislead the jury, and does not cover the points of the instruction asked for.²³

In Georgia, where an instruction is asked for on the condition that the evidence sustains it, the court may adopt the opposite alternative, and give a directly opposite charge, if the evidence preponderates on that side.²⁴

In Michigan, however correct any specific request may be, it may be refused if the judge, in a written charge already given, fairly leaves to the jury the question substantially raised by the request. And the court remarked, in a certain case, that the "jury will always better understand a charge given as one connected whole than if the same matter were broken up into separate and detached portions, which are more likely to confuse than to enlighten."²⁵

In Missouri, it is held, that, when counsel present to the court correct views of the law in a clear and distinct form, and so as not to mislead the jury, the better practice is for the court to adopt the instruc-

²² R. R. v. Polly, 14 Gratt. 448.

²³ R. R. v. Laffertys, 14 Gratt. 478.

²⁴ Thomas v. State, 27 Ga. 288.

²⁵ Fisher v. People, 20 Mich. 144.

tions thus presented; yet the judge has a right to present his own views in his own language; and often, from the obscurity or multiplicity of instructions presented by counsel, it is his duty to do so.²⁶

§ 353. Where a plaintiff's prayer, leaving to the jury the inquiry whether certain estimates were made in good faith or not, is granted with the assent of the defendant, the latter cannot afterwards object to the same inquiry being made a part of his own prayers. For what is admitted to be the law of the case cannot be gainsaid before a jury; and a defendant, after conceding a prayer involving a certain question of fact, cannot deny that such an inquiry is before the jury, any more than he can argue against the law of instructions given without such assent.²⁷

§ 354. A prayer may be a partial one, not taking in opposing evidence, and yet proper, so as to make it obligatory upon the court to grant it; since a party has a right to segregate a portion of the testimony in a cause, and ask the opinion of the court upon it, unless, in doing so, his prayer tends to mislead the jury.²⁸

§ 355. A court is not bound to give a doubtful instruction, nor express an opinion, still less to charge, concerning the motives or belief of a party as to fraudulent representations, when the evidence is not clear enough to warrant a peremptory ruling as to the law applicable to the matter.²⁹

§ 356. It is imperative that all instructions, even those asked by the jury after they have retired for

²⁶ *Harman v. Shotwell*, 49 Mo. 423.

²⁷ *R. R. v. Resley*, 14 Md. 424.

²⁸ *Williams v. Woods*, 16 Md. 257.

²⁹ *Moore v. Meacham*, 10 N. Y. 212.

deliberation on their verdict, should be given in open court, in order that there may be opportunity to know what they are, and to except to them if desired, or ask any other necessary explanations; nor does it matter that the additional instructions are precisely the same in principle with those previously given.³⁰ And so, where the judge, being requested by the jury to give them further instructions, went to the courtroom during the hours of recess, and the jury were conducted into his presence, and there instructed, in the absence of parties and counsel, and without notice to them, it was held decidedly erroneous.³¹ And even where the charge only consists of a repetition of a portion of the previous charge given before they retired to make up a verdict, and particularly in criminal cases; for a prisoner undoubtedly has a right to be present at every step of the proceedings in his trial.³²

But it is a privilege which may be waived, at least in a civil action, and, by parity of reason, in a criminal action likewise. And, in a case on *certiorari*, the justice gives this account: "After the jury had been out a short time, they sent for the court in their room to explain. I called for the parties, and it appeared the defendant had absconded, although under a warrant, and his counsel refused to go in. I, however, went in, and found they wished the opinion of the court on the indorsement of the note, as there was no date to it. My answer was that I should consider it as due when indorsed, as it was thus intimated on the

³⁰ O'Connor v. Guthrie, 11 Iowa, 80.

³² State v. Blackwelder, Phill. (N. C.) 38.

³¹ Campbell v. Becket, 8 Ohio St. 214.

plaintiff's state of demand, and not denied by the defendant in his pleading." And on this statement by the judge below, the Supreme Court remarked, "If a jury, after withdrawing to consider the cause, get embarrassed on a question of law, they may, and in prudence ought to, ask for the opinion of the justice thereon, and it is his duty to declare the law to them. It should be done in the presence of both parties, that they may except to the opinion for error, if they think it erroneous; and therefore they ought to be called, and even sought for, by the constable or other person deputed by the court. But if, sought for honestly at the place of trial, where they ought to be, they cannot be found, or, being found, they, or either of them, refuse to attend, such absence or refusal does not release the justice from his duty to declare the law to the jury. . . . Whether the justice delivers his charge in the room where the trial was heard, or in the room where the jury is convened, is wholly immaterial in law and in reason, provided there is notice, or a reasonable effort to give notice, to parties to be present, and the room is made public to everybody during the charge. But if a justice should go into the jury-room secretly and unknown to parties, and there hold private conference with the jury, it would excite allowable jealousies in both parties, and be such an outrage upon the essential forms of trial as to vitiate all the proceedings." ³³

§ 357. As to the time when requests for instructions must be presented in the first instance, courts may adopt any reasonable rule pertaining thereto; as,

³³ *Cook v. Green*, 1 Halst. (N. J.) 109.

for example, that the presentation shall be before the commencement of the argument in the cause.³⁴ But a rule that "A party desiring written instructions to the jury must notify the court of such desire before the trial commences, or his right to the same will be considered as waived," was held void, in Indiana, as repugnant to the law.³⁵

Where a reasonable rule has been adopted, it is not error to enforce it.³⁶ Yet it should not be held to so rigidly as to defeat instead of promote the ends of justice, and especially where life or liberty is at stake. And so, in California, it has been held that, where, in a criminal prosecution, injustice would be done to the prisoner by refusing to consider requests offered after argument, under a rule requiring the presentation thereof before argument, — as where instructions are made necessary by any argument or propositions of the district attorney, — the instructions asked should be given for the prisoner, or else the court should so explain its charge as to put the law correctly before the jury.³⁷ And, in Missouri, it has been held, that where a departure from rule will do no harm, it is not cause for reversal.³⁸ In Iowa, it was held error for the court to refuse to instruct where the request was handed in during the opening and only argument in the cause, on the ground that it was submitted so late in the cause that it could not

³⁴ *Prindeville v. People*, 42 Ill. 221; *Cluskey v. St. Louis*, 50 Mo. 89; *Firman v. Blood*, 2 Kan. 496.

³⁵ *Laselle v. Wells*, 17 Ind. 34.

³⁶ *Waldie v. Dall*, 29 Cal. 556; *Firman v. Blood*, 2 Kan. 496.

³⁷ *People v. Sears*, 18 Cal. 635.

³⁸ *Cluskey v. St. Louis*, 50

Mo. 89.

be examined without keeping the jury in waiting.³⁹ And, in Michigan, where, in a case of murder, the court charged the jury, and afterwards the prisoner's counsel requested a charge, that, as to good character, it is for the jury to consider whether such reputation tends to rebut the presumption of malice, and the court refused to grant it on the ground that it might mislead the jury, without further explanation, which the court did not then feel bound to give, in view of a rule adopted by the court requiring that requests to charge must be handed in by counsel before the argument was commenced, it was held that the rule was reasonable, and ought, ordinarily, to be complied with, but that no unbending rule to this effect could be laid down, especially as the necessity for requests to charge may often arise from the very charge given by the judge.⁴⁰

§ 358. Where a legal, pertinent charge is requested, in writing, of the court, and read by the counsel in the presence of the jury, the court should give it, though in the language of the request; and it is improper to hold up the paper containing the request, after the same has been read by counsel, and say, "Gentlemen, I give you all this in charge, as requested."⁴¹

³⁹ *McCaleb v. Smith*, 22 Iowa, 243.

⁴⁰ *People v. Garbutt*, 17 Mich. 10.

⁴¹ *Leaptrot v. Robertson*, 44 Ga. 46.

CHAPTER III.

ORAL AND WRITTEN REQUESTS AND INSTRUCTIONS.

§ 359. THERE is a difference of practice in different courts as to oral and written charges. I suppose that wherever written instructions are not specifically required by statute, it is sufficient to state the law to the jury orally. In some states, oral charges may be given where writing is not requested, and in others writing is imperative, and cannot be dispensed with at all, or only by explicit consent of parties or their counsel, and in others still writing seems to have been left discretionary with the court.

In Illinois, it is imperative that instructions be in writing, and this writing is not subject to any verbal explanations. But the court seem to express strong dissatisfaction with the statute, although not clearly intimating the grounds on which that dissatisfaction rests. "This statute," say they, "plainly inhibits the Circuit Courts from changing or in any measure affecting orally the law as stated in written instructions given; and in a case of so clear intention of the law-making power, there is no room by instruction to avoid consequences, however inconvenient in practice or detrimental to the administration of justice. The law being so written, the courts must submit to and abide the mandate, and trust to the wisdom of the

legislature for such change as experience may suggest. It is true it does not appear what the oral explanations and qualifications were, yet the words import a modification, limitation, restriction, or construction of the written instructions, and therefore a change in some degree of the law, as stated in writing. This is plainly forbidden."¹

And the Colorado Territory Supreme Court quote the decision, apparently in the same spirit, in regard to the statute there in force, saying, "This statute is mandatory, and we must submit to it so long as the legislature suffers it to remain a law."² But it seems that there the parties may consent to oral additions expressly, and thus legalize them,³ but probably only in a civil case.

In California, the court has no right, in a criminal case, to charge or instruct orally without the consent of the prisoner. And the fact that the judge told the prisoner's counsel that he would put his charge in writing, if desired, does not help the case; nor will it do to say that the instruction, as given, can do no harm, for the very point of inquiry is, what the court did actually charge. The charge must be put in such shape as that the prisoner can get the benefit of it, since he is entitled to stand on his strict legal rights, and to avail himself of any errors to defeat a conviction. Nor is it necessary that the prisoner should except to the charge at the time it is given.⁴ And any consent must be express, and cannot be presumed

¹ *Ray v. Wooters*, 19 Ill. 82.

³ *Dorsett v. Crew*, Ibid. 22.

² *Gill v. People*, 1 Col. T. 61.

⁴ *People v. Ah Fong*, 12 Cal.

from the presence of the prisoner and his failure to make objection.⁵

In Texas, a verbal instruction cannot be given without the consent of the party, or his attorney.⁶ But it seems that a party can consent to his own instructions being given orally, and that the opposite party cannot object to it.⁷

The Ohio statute requires that an oral charge shall, upon application by either party, be reduced to writing before the jury retires to consider the verdict.⁸

In Florida, requests are to be presented in writing, and then the judge is to "declare in writing his ruling thereon as presented, and pronounce the same to the jury as given or refused," and write out also and deliver to the jury his own ruling of the law upon the points raised. And it is held that the court should, in all cases, give an accused person a reasonable opportunity to reduce to writing such instructions as he might desire upon matters transpiring during the trial, and that a denial of this is a denial of his right to be heard in his defence.⁹ The judge may omit, however, to charge the jury when no instructions are specially requested in writing; but when he does charge, under such circumstances, he must not only confine himself to the law applicable to the case, but also reduce his charge to writing before it is delivered.¹⁰

In Indiana, it is imperative to reduce instructions

⁵ *People v. Chares*, 26 Cal. 78; *People v. Beeler*, 6 Cal. 246.

⁶ *Clark v. State*, 31 Tex. 575.

⁷ *Boone v. Thompson*, 17 Texas, 607.

⁸ *Hardey v. Turney*, 9 Ohio St. 401.

⁹ *Dixon v. State*, 13 Fla.

650.

¹⁰ *Long v. State*, 11 Fla. 295.

to writing, where either party requests, and to give it as written, without verbal modifications or explanations.¹¹ And so, where the court proceeded, after request, to charge the jury verbally from a writing lying on the judge's desk, and, on objection made, remarked that a part of the charge was reduced to writing, and that what had been given should also be reduced to writing, and accordingly the verbal charge, verbally given, was substantially, but not literally, reduced to writing, and read over again to the jury, it was held error.¹² And accordingly the certificate of a judge as to what were the words used in a verbal charge cannot be received over the objection of a party.¹³

But it was held no violation, where there was a request for a written charge, for the judge to repeat orally a part of one of the instructions, and then, in reading another, to remark orally that he had not intended to read so far, and re-read it as he had intended to give it.¹⁴

However, oral instructions are evidently the rule in that state, and written the exception, occurring only on special requests, and being therefore regarded less a matter of right than of favor or privilege. And accordingly, even where a request has been made, and yet the court gave a part of the charge orally, it has been held that the party waives the error by not excepting thereto;¹⁵ although, if such a request is

¹¹ *R. R. v. Daniels*, 21 Ind. 260.

¹⁴ *Pate v. Wright*, 30 Ind.

¹² *Turnpike Co. v. Conway*, 479.

7 Ind. 187.

¹⁵ *Heuston v. R. R.* 16 Ind.

¹³ *Widner v. State*, 28 Ind. 395. 281.

properly made, and the court accompanies its instructions with any verbal explanations, comments, or remarks, though not inconsistent with the law, as set forth in the written instructions, and in no way rehearsing the evidence, it will constitute a good ground for granting a new trial, at the motion of the party making the request.¹⁶ It has been uniformly decided in that state, by a series of decisions on the point, that a request for a written charge comes too late, when presented as the court is proceeding to instruct orally upon the general points of the cause.¹⁷

In Iowa, if either party desires the charge to be in writing, it must be so;¹⁸ but it seems it may be first delivered orally, and then reduced to writing, unless there is objection.¹⁹ And in a case where the court orally explained the instructions given to the jury in writing, and appellants, supposing that the explanations were also written, took no exceptions until after the verdict was returned, when, becoming apprised of the fact that the explanations were not in writing, they moved the court for a new trial on this ground, and the motion was sustained, the Supreme Court, regarding this as a matter of discretion in the court below, would not interfere.²⁰

In Kentucky, it is held that a casual remark, though not definitely given as an instruction, may be a virtual instruction; and if oral, therefore, it is ille-

¹⁶ *Meredith v. Crawford*, 34 Ind. 400.

¹⁷ *Boggs v. Clifton*, 17 Ind. 218.

¹⁸ *Stratton v. Paul*, 10 Iowa, 140.

¹⁹ *State v. Sipult*, 17 Iowa, 576.

²⁰ *Head v. Langworthy*, 15 Iowa, 235.

gal. Thus, in a criminal case, a constable who made the arrest testified that the prisoner had freely confessed his guilt, and thereupon the prisoner's counsel, with the avowed purpose of showing the witness's frailty of memory and self-contradiction, offered his own written statement of his testimony before the examining court, subscribed by himself, which was admitted, against the objection of the prosecuting attorney, and the court thereon said that "the defendant's attorney has let down the fence, and now all is before the jury." The Supreme Court severely animadverted upon this remark, declaring that "this voluntary declaration was ultrajudicial and misleading. It erroneously implied not only that the written statement was evidence of all the facts contained in it, but also that it was the more impressive, as proof offered by the accused himself. Now, while that written statement was certainly competent for the purpose for which it was read, it was as certainly incompetent evidence of the truth of the facts it recited, and therefore this unnecessary and significantly illustrative interference by the circuit judge was an error in law, and was probably the more misleading as indicating that it was stamped with the appellant's own recognition of the truth of the facts so stated. We cannot speculate on the actual effect of this blunder. It is sufficient for this court to know that it was wrong, and may have operated to the prejudice of the appellant. Moreover, the declaration, which was a virtual instruction, was merely oral, and was therefore illegal."²¹

²¹ *Coppage v. Commonwealth*, 3 Bush. 533.

In Alabama, requests must be in writing, or it is the duty of the court to refuse them. But if a charge which asserts a correct legal proposition is asked and refused, the court would formerly presume that it was presented in writing, unless the record showed affirmatively that it was refused because verbal.²² And a request must be given or refused in the terms thereof, the court having no right to modify or add any qualifications whatever. This is rigid enough, and the Supreme Court say of it, "We do not approve of the law; yet it is so written, and the accused had a right to insist upon the law as it is."²³ Nor does it matter whether the qualification is written or oral, or even by allusion only to other charges already given.²⁴

The rule of presumption as to requests being in writing has been changed by later decisions, and it is now requisite that the record should show affirmatively that the request was in writing.²⁵ And it is held that where the request is not in writing, it may be refused, and then afterwards given with a qualification by reference to another charge already given and not objected to.²⁶

In Wisconsin, the charge must be in writing, if requested.²⁷ In Maryland, it is in the first instance discretionary with the court to give instructions orally or in writing; but where an oral charge is first given, either party may have it reduced to writing for the purpose of excepting to it.²⁸

²² *Myatts v. Moore*, 41 Ala. 222.

²³ *Edgar v. State*, 43 Ala. 53.

²⁴ *Lyon v. Kent*, 45 Ala. 656.

²⁵ *Broadbent v. Scientific & Art Association*, 45 Ala. 170.

²⁶ *Milner v. Wilson*, 45 Ala. 478.

²⁷ *Hasbrouck v. Milwaukee*, 21 Wis. 238.

²⁸ *Smith v. Crichton*, 33 Md. 103.

In Georgia, a specific charge must be asked for in writing.²⁹

In Maine, it has been held proper to submit to the jury written questions, with such instructions as would give the jury to understand that upon their specific answers thereto the rights of the parties depended, and to reserve at the same time instructions as to the legal effect of the answers, until the questions of fact embraced in the questions should be determined. The court above, in approving the novel proceeding, say, "Such a course, if the questions did in fact embrace the substance of the issue presented, would seem well calculated to secure a fair determination of the exact matters of fact in controversy, unembarrassed by irrelevant issues, and unbiassed by prejudice or sympathy for or against either party; and in a case where the result must depend upon the answers to one or two direct questions, we think neither party can object to the adoption of this course by the presiding judge, in his discretion, in lieu of an attempt to disentangle the case from its embarrassments by specific instructions as to all the matters involved in the outset — an attempt which, in complicated cases, it is to be feared, is not infrequently rendered abortive by the misapprehension or forgetfulness of the jury. The method here pursued seems to have the merit of simplicity and directness."³⁰

²⁹ *Street v. Lynch*, 38 Ga. 638.

³⁰ *Hovey v. Hobson*, 55 Me. 277.

CHAPTER IV.

MODIFICATIONS AND REFUSALS.

§ 360. IT is manifest that there must necessarily be lodged in the court a discretion to be exercised carefully in submitting a cause to the decision of a jury, which discretion may consist in refusing instructions judged improper, absolutely, or else partially refusing, and giving the instructions in a modified form, and not as requested. A refusal of an explicit instruction asked for is by no means to be regarded as equivalent to an assertion of the opposite principle from that therein stated, and in many cases such an interpretation would involve gross absurdities. Refusals may rest on various grounds, and may be quite proper, at times, in relation to a charge embodying a correct legal proposition,¹ as we shall have occasion to show hereafter.

§ 361. But a refusal must not be arbitrary in any case; and so, to refuse an instruction asked for soon after the court had refused one deemed deficient in form, but embodying the same legal principle, on the ground that it was tendered after the time prescribed by the rule of court for the presentation of requests, is not a proper exercise of the discretion of the court, where the giving could not injure the opposite party, and refusing to give it deprives the party of the ap-

¹ *Miles v. Davis*, 19 Mo. 413.

plication of a legal principle, to which he is entitled by the facts of the case.²

§ 362. Obscurity in the language is always a proper ground for refusal, because it introduces confusion into the case. Thus, in a criminal case, this instruction was given: "If, in reviewing all the testimony introduced on the part of the state, you are satisfied of the guilt or innocence of the defendants, under the rules given you by the court, you will then consider the defences set up by the defendants; and in considering that of *alibi*, you will bear in mind that it devolves upon the party urging it to establish the same to your satisfaction, by evidence. It is not sufficient to warrant an acquittal, that he merely raises a reasonable doubt as to whether the *alibi* is established, but, as before stated, you must be satisfied of its truth by testimony. If you believe, from the testimony, that the defendant, at the time alleged, was in the city of Virginia, you must acquit him."

Now, there seem to be glimmerings of the correct law of the case throughout this instruction, but, on appeal, the court above dealt with it in this very severe style: "We have italicized part of the instruction, to call attention to it. If it means anything which is not absolutely nonsense, it means this: 'You will first consider the evidence of the state, and if that, standing alone, produces on your minds a conviction, beyond all reasonable doubt, of the guilt of the prisoner, you will then consider the evidence given by defendants; and in considering that which tends to

² Hill v. Wright, 23 Ark. 531.

prove an *alibi*, you must bear in mind that it is not sufficient for the defendant to have produced on your minds a reasonable doubt as to whether they were present at the place of robbery, or were at a totally different place when the felony was committed. Reasonable doubt on this subject is not sufficient; there must be a preponderance of evidence tending to establish the *alibi*. In other words, the evidence which the prisoner introduces, tending to show he was in Virginia, or Carson, as the case may be, at the time the offence was committed, must be stronger, and less susceptible of doubt, than that introduced by the state to show they were not at those cities when the offence was committed, but at a point between the two, where the stage was robbed.' If it does not mean this, then it means that the jury may believe, from the testimony of the state, that the prisoners were, beyond a doubt, at the place of robbery at a certain hour, and may also believe, from the testimony of the defendants, that probably at the very same moment of time they were at a totally different place. In other words, in order to convict Waterman, you may believe that he could be corporally present in two different places at the same time. This, it appears to us, is utter nonsense."³

But with all due deference, I may be allowed to say that, to an indifferent spectator, the court above appears almost as much entangled in its criticism as the court below in its instruction, the whole being decidedly foggy all around. But it illustrates aptly

³ State v. Waterman et al. 1 Nev. 562.

the strict necessity of clear and precise language, in the instructions of a court to a jury.

§ 363. A singular case arose in Indiana, wherein counsel assigned for error the refusal of the court to instruct the jury, and the court above held that there had been no such refusal. The case was argued on the trial, and then the court remarked to the jury, "Gentlemen, I have no instructions to give you. Defendant's counsel have requested me to instruct you in writing, which I am not prepared to do, having had no time to write instructions. If counsel require me to put my instructions in writing, without giving me time to prepare them, they must do without them. You will therefore retire, in charge of your bailiff, and do what is right between the parties." After being absent about five hours, the jury returned, and reported that there was no prospect of an agreement; whereupon the court said, "Gentlemen, you ought to come to some conclusion. This cause has occupied a good deal of your time, and ought not to give you much trouble. If you should not agree, it would be a large expense to the county, as well as to the parties, to try it over again. If some of you would give, and others take, a little, you might come to some agreement. I shall have supper prepared for you by eight o'clock." In about two hours after they returned a verdict for defendant. On appeal, it was held that it could not be said that the court did not instruct the jury, and that perhaps any different instructions than those given might have been unnecessary.⁴

⁴ *Kraak v. Wolf*, 39 Ind. 89.

§ 364. It is held by the Supreme Court of the United States not to be error for a court to refuse to give an extended series of instructions, although some of them may be correct in the propositions of law they present, if the law has been given with sufficient fulness in a general charge to guide the jury correctly, and that a judgment is not to be set aside because the charge of the court may be vulnerable to verbal criticism in particulars considered apart from their connections, which could not, when taken with the remainder of the charge, mislead a jury of ordinary intelligence.⁵

§ 365. Where an instruction asked for does not correctly expound the law, the court may refuse to give it, and, as a general rule, cannot be required to adopt it, or give another in its stead.⁶ And even where it is correct, it may be refused, unless it distinctly appears both appropriate and necessary to the decision of the cause.⁷ Or where a legal charge pertinent to the issue is improperly refused, yet if it appears from all the evidence that the verdict is right, and would probably have been found the same if the rejected charge had been given, the refusal is no ground for a new trial.⁸

§ 366. Without a direct refusal, an omission to give a correct and pertinent instruction is error, if thereby the jury are left without a proper rule for their guidance,⁹ although the general rule is, that an

⁵ *R. R. v. Whitton*, 13 Wall. 290.

⁶ *Rosenbaums v. Weeden*, 18 Gratt. 785.

⁷ *Wells v. Prince*, 15 Gray, 562.

⁸ *R. R. v. Scott*, 37 Ga. 94.

⁹ *Whitney v. Inhabitants*, 12 Allen, 113.

omission to charge on a particular aspect of a case is not error, where no specific instruction thereon has been requested.¹⁰ And while a party cannot, in general, complain of the failure of the court to give instructions which he has neglected to ask, provided the jury are left free to act upon the facts, yet if they are not thus left free, but are in effect instructed that certain vital points are entitled to no consideration, the case is different.¹¹ An explanation attached to the record by the judge below that "It is perhaps due to the court to say, that if the charge is not in response to the instructions prayed, it was because the counsel who prayed the instructions, and who spoke in a low tone of voice, was not understood by the court," can have no bearing on the legal rights of a prisoner,¹² nor by parity of reason of any party.

§ 367. A remark, which is in itself incorrect, made by a judge in refusing an instruction, is not exceptionable where it is a mere abstraction, having nothing to do with the matter in hand, and thus harmless.¹³ And a full, clear, and accurate charge cures an error sometimes, in refusing an instruction asked for.¹⁴

§ 368. In general, it is optional with a court to refuse an instruction which is incorrect, or to modify it, so as to make it correct, and then give it, as thus modified.

In Pennsylvania, however, it is held to be the duty

¹⁰ *Bain v. Doran*, 54 Pa. St. 124.

¹¹ *Chamblee v. Tarbox*, 27 Tex. 146.

¹² *State v. Christmas*, 6 Jones L. (N. C.) 474.

¹³ *Patterson v. People*, 46 Barb. 638.

¹⁴ *Davis v. Perley*, 30 Cal. 640.

of the court to qualify an instruction, if thereby it can be adapted to its purpose.¹⁵ But the weight of authority makes it rather a matter of discretion than of obligation, so that it is not error to refuse an instruction, if asked in terms which require qualification,¹⁶ on the general principle that an instruction in part erroneous may be entirely rejected,¹⁷ and that if it admits of two constructions, one of which is correct, but the other confusing and misleading, it may be refused.¹⁸ In general, the right of the court to modify a request is undoubted, and this may be done by change, or by addition.¹⁹ And the reason given by the Supreme Court of California is, that "It is very easy for ingenious counsel to so frame a proposition as to state the rule of law correctly, and yet convey to the jury, who only hear it read once, a very erroneous impression, or to stop far short of the whole principle proper to be stated. It would be manifestly improper to give such an instruction to the jury without comment or explanation;" and further, "An instruction, as asked for, may be so equivocal, that to give or refuse it might mislead the jury, and thus it might have all the effect of an erroneous instruction. In such a case, it is proper for the court to modify the instruction so as to make it plain."²⁰

In the United States Courts, not only may a judge modify instructions asked, but even disregard the

¹⁵ *Hays v. Paul*, 51 Pa. St. 139.

¹⁶ *Grimes v. Martin*, 10 Iowa, 347.

¹⁷ *Keenan v. Ins. Co.* 12 Iowa, 126; *Godbold v. Blair*, 27 Ala. 595.

¹⁸ *Ralston v. Langdon*, 26 Ala. 661.

¹⁹ *People v. Dodge*, 30 Cal. 450.

²⁰ *Rosenbaums v. Weeden*, 18 Gratt. 798.

written points of counsel, and charge the jury in his own way, if he fairly submits the facts, and fully gives his opinion on all the questions of law arising in the case.²¹

In Mississippi, the right of modification extends to even correct instructions; so that if a judge qualifies the request presented so as to express his views of the law, it is not error, even though the request itself was also correct.²²

Formerly, the discretion of the court was held under very rigid guards in California, where it was maintained that while an instruction asked for could be modified so as to make the phraseology more intelligible to the jury, the change must not affect the sense thereof.²³ But a later decision has very properly overruled the former cases, and therein the following sensible reason is given for it: "To those cases, so far as they may be construed to uphold the doctrine that a party may of right insist that an instruction shall be given or refused as asked, and that a modification thereof by the court, whether right or wrong, is of itself error, we are unable to give our consent. It is the duty and province of the judge to expound the law, and it is his right and privilege, in doing so, to select and make use of such language and illustration as in his judgment is best calculated to explain the same, and render it clear to the comprehension of the jury. Upon him the law imposes the duty, and he may determine the manner of its performance.

²¹ *Law v. Cross*, 1 Black (U. S.) 533.

²³ *Conrad v. Lindley*, 2 Cal. 173; *Jamson v. Quivey*, 5 Cal.

²² *George v. State*, 39 Miss. 490.
570.

Counsel may propose such instructions as their wisdom may suggest, and submit them to the judge; but beyond this they have no legal right to dictate to the judge either the form or substance. If, in the opinion of the judge, such instructions are defective in form or expression, or erroneous in law, he may, at his election, modify them in either particular, and give them to the jury in their modified form, or he may refuse to give them altogether. If error be assigned upon such instruction, the test question is not, Did the judge modify the instruction? On the contrary, the test is the same as in other cases, and is to be applied to the instruction in its modified form; and if it appear that the instruction, as modified, correctly states the law, no error has intervened. This court passes upon instructions, so far as they are given, in the form in which they were received by the jury, and the fact that they were prepared by counsel, and, before given, modified by the court, cannot be regarded as error *per se*, or as having any bearing whatever upon the question of error.”²⁴

In Texas, where an instruction was asked as to the right of a plaintiff to recover for professional services in this language, “that the plaintiff was not entitled to recover unless he has proved, to the satisfaction of the jury, that he was a regular physician,” the judge erased the word “regular,” and substituted the words “skilful,” and “efficient,” and it was held no error.²⁵

There has been some wavering in Alabama. The code (§ 2355) requires a correct charge, not tending

²⁴ *Boyce v. Stage Co.* 25 Cal.

²⁵ *Mays v. Hogan*, 4 Tex. 26.

to mislead, to be given, as asked. But where it seems to bear unequally, it may be modified by an additional explanatory charge.²⁶

In Mississippi, the court has the discretionary right to modify even correct requests, provided the modifications made properly declare the law.²⁷

In North Carolina, the privilege of modification appears still to be confined to the phraseology.²⁸

§ 369. A modification may be made sometimes, by means of a counteracting instruction, in behalf of the opposite party; and if, upon the whole, and by construing the two together, the law is correctly given, the error in the first instruction is regarded as cured.²⁹ And it is held that an instruction containing an illegal proposition can be modified, on the suggestion of an opposite party.³⁰ And in Alabama, an additional explanatory charge may be given, where language is ambiguous, on request of a party.³¹ And so in Illinois, where it is held that it is the right of a party, when he fears that the jury may be misled by an instruction, to ask such further instructions as will explain those already given, and prevent the possibility of a mistake.³²

§ 370. Where a written charge was given, with an oral explanation, and the explanation was objected to because it was oral, and the judge withdrew both the instruction and the modification, and reduced them to

²⁶ Bell's *Adm'r v. Gray*, 35 Ala. 209.

³⁰ Crawford's *Adm'r v. Beall's Ex'r*, 21 Md. 209.

²⁷ *Mask v. State*, 36 Miss. 94.

³¹ *Sharp v. Burns*, 35 Ala.

²⁸ *State v. Brantley*, 63 N. C. 654.

³² *Warner v. Dunnavan*, 23

²⁹ *Van Buskirk v. Day*, 32 Ill. 380.

Ill. 260.

writing, then read them to the jury as written, directing them to disregard them as first given, it was sustained, on appeal.³³ And usually a party has the right to require all modifications and explanations, as well as original instructions, to be in writing.³⁴

§ 371. It has been held, in Minnesota, that where there is a qualified form of instruction, it should be explicit, and ought probably to follow immediately upon the refusal of the presented form, since otherwise the jury might regard it as an absolute refusal to charge as requested, and the injurious effect thus produced will in general be the same, whether the proposition has, in substance, been affirmed in other terms, in a former part of the charge, or not. And if the charge asked for be correct, it should be given, although covered by the instructions already submitted; or, if there be a distinction, it should be drawn for them, since here, also, the refusal, unless carefully guarded and explained, is apt to confuse the jury, and lessen the effect of the proposition already stated to them.³⁵

§ 372. Modifications of an instruction asked should be pertinent to the instruction as asked, and when the modification made is erroneous, if pertinent, the judgment will be reversed.³⁶ And pertinent also to the evidence, and not based upon a state of facts purely conjectural.³⁷

§ 373. And great care must be taken that the mod-

³³ *People v. Garcia*, 25 Cal. 535.

³⁶ *State v. Green*, 20 Iowa, 424.

³⁴ *Tenbrook v. Brown*, 17 Ind. 411.

³⁷ *Bain v. Wilson*, 10 Ohio St. 14.

³⁵ *Selden v. Bank*, 3 Minn. 181.

ification itself be not misleading. A defendant asked this instruction, that if the jury "believed from the evidence that plaintiff and testator, in his lifetime, had a settlement in January, 1851, and in pursuance of said settlement a note was executed by defendant's intestate to plaintiff, and accepted by him, such a settlement is a circumstance from which they may presume that the demands were settled between the parties up to the time of said settlement." The court modified the instruction by appending the words, "provided they find from the proof that the debt sued for was included in said settlement." The modification was held to be misleading, for the reason that it implied that other proof, besides the settlement itself, was necessary to a finding that the demand sued for was included in the settlement.³⁸

§ 374. A modification is pertinent to the instruction asked, when it does not materially vary the principle embraced in the request, or no farther than to make it legally correct. Thus, where the court was asked to charge that "verbal confessions of guilt are to be received with great caution," and the court, after the word guilt, inserted the words "uncorroborated by circumstances," it was held no essential varying of the principle embodied in the request.³⁹

§ 375. If there is anything peculiar in the situation of the parties, or their relations to each other, which would require a modification of the general rule of law, and which has escaped the attention of the judge, it is the duty of the party affected thereby to call his

³⁸ *Thomas, Exec'r, v. Thomas*, 15 B. Mon. (Ky.) 178.

³⁹ *State v. Wilson*, 8 Clarke (Iowa) 412.

attention to it, as, for example, in the matter of official duty. Thus, this instruction was sustained by the appellate court: "If the prisoner had been previously arrested, on the same warrant, by the officer, Brown, and had escaped without questioning his authority, he was not entitled to the right to the same extent to demand the authority after his escape, that he would have had if he had not escaped from the arrest."⁴⁰

CHAPTER V.

REPETITIONS AND ADDITIONAL INSTRUCTIONS.

§ 376. It is the general rule, not only that repetitions in charging a jury may be refused properly, but that they ought to be discouraged on the ground that, at the least, a multiplication of instructions, announcing in effect the same legal principle, tends only to encumber the record, and perhaps to confuse the jury.¹ And the Supreme Court of Illinois remark, "We do not understand why it is that counsel, where they have a good cause, will seek to encumber it with such a multitude of instructions, the almost invariable effect of which is to introduce manifest error into the record. Such a practice does not enlighten the minds of a jury on the issues submitted to them, but rather tends to introduce confusion. Instructions should always be clear, accurate, and concise statements of the law

⁴⁰ *State v. Phinney*, 42 Me. 391.

¹ *Sadler et al. Adm'rs v. Sadler*, 16 Ark. 642.

as applicable to the facts of the case. It was never contemplated under the provisions of the practice act, that the court should be required to give a vast number of instructions, amounting in the aggregate to a lengthy address. It is a mischievous practice, and ought to be discontinued. A few concise statements of the law applicable to the facts are all that can be required, and are all that can serve any practical purpose in the elucidation of the case.”²

Yet it has been held, in California, that it may often be better to give repetitions, when asked, than to refuse them, because by such refusal a pretext is afforded for an appeal, which otherwise might not be taken.³ And yet this does not appear to be conclusive, since, if parties seek pretexts for appeal, these are rarely wanting to them.

§ 377. It is wonderful how frequently the matter of repeated instructions has come up before the appellate courts, notwithstanding the clearness and reasonableness of the rule that it is not error to refuse to give instructions asked for, even if correct in point of law, provided those given cover the entire case, and submit it properly to the jury, — which rule has been over and over reiterated, until one would suppose the entire profession would be thoroughly imbued with it.⁴

² *Adams v. Smith*, 58 Ill. 419.

³ *People v. Strong*, 30 Cal. 155.

⁴ *Laber v. Cooper*, 7 Wall. 571; *Corny v. Tompkins*, 17 Ga. 351; *Oliver v. Chapman*, 15 Tex. 400; *State v. Knight*,

43 Me. 12; *Moye v. Herndon*, 30 Miss. 110; *Dennis v. McLaurin*, 31 Miss. 607; *Keech v. R. R.* 17 Md. 47; *Coal & Iron Co.* 27 Md. 603; *Goldsborough v. Cradie*, 28 Md. 477; *R. R. v. Schumaker*, 29 Md. 176; *Pela-*

And the objections against repetitions cannot be obviated merely by varying the language, even substantial repetitions being alike censurable, because courts should simplify their directions to the jury, and not embarrass them by elaborations of the same point in different ways.⁵

§ 378. Where it is judged proper to repeat instructions, it has been held that the repetitions will be held to the most rigid exactness, indeed, to strict technical correctness.⁶

§ 379. And where they are refused, also, much caution is requisite to avoid prejudicing the jury thereby; so that it has been held, quite properly, in California, that, in refusing such instruction, the court should always, in the presence of the jury, strictly place the refusal on the ground that equivalent instructions had been previously given, that they may

monges v. Clark, 9 Iowa, 3; *Mo.* 162; *State v. Harald*, 33
Payne v. Billingham, 10 Iowa, *Mo.* 496.
 360; *Russ v. Steamboat*, 14
 Iowa, 364; *Harper v. Madren*,
 21 Iowa, 407; *Brown v. Brooks*,
 3 Ind. 518; *Nelson v. Hardy*,
 7 Ind. 364; *Mumford v. Thomas*,
 10 Ind. 167; *Hartley v. Markel*,
 44 Ill. 226; *McKichan v. Mc-*
Bean, 45 Ill. 228; *Baker v. Rob-*
inson, 49 Ill. 299; *Chapman v.*
Cawrey, 50 Ill. 514; *Hotchkins*
v. Hodge, 38 Barb. 123; *Hol-*
brook v. R. R. 2 Kernan, 236;
Jones v. Briscoe, 24 Mo. 502;
Beale v. Cullum, 31 Mo. 258;
Gonsalis v. Gearhart, 31 Mo.
 585; *Bay v. Sullivan*, 30 Mo.
 191; *Gregory v. Cheatham*, 36

⁵ *State to use, &c. v. King*,
 44 Mo. 241; *State v. Neville*,
 6 Jones L. (N. C.) 424; *Rice v.*
State, 3 Kan. 142; *Maffitt v.*
Cressler, 8 Clarke (Iowa) 122;
Mills v. Mabon, 9 Iowa, 485;
State v. Hockenbeny, 11 Iowa,
 270; *Trustees, &c. v. Hill*, 12
 Iowa, 463; *Karney v. Paisley*,
 13 Iowa, 94; *Mason v. Jones*,
 36 Ill. 212; *Hessing v. McClos-*
key, 37 Ill. 343; *Murphy v.*
People, 37 Ill. 448; *Kennedy v.*
People, 40 Ill. 489.

⁶ *State v. Anderson*, 4 Nev.
 277.

not be misled on account of the refusal.⁷ And, moreover, if this is not done in a criminal case, the Supreme Court will reverse the judgment, provided the instruction requested was in itself clear and explicit, and left no reason for doubt or misconstruction, being, in a word, free from objection.⁸

§ 380. Nevertheless, a necessity may arise for further instructions to a jury, after the jury have retired to consider their verdict. Thus, where the jury are unable to agree, and return into court, but the attorneys on both sides object to their discharge, but require them to be confined until they reach a verdict, and the court, in the presence of the parties, gives them an additional legal instruction to meet the difficulties experienced by the jurors as to matters of law, and sends them back to their room for deliberation.⁹ And this additional instruction may be given by reading over the evidence on both sides, or even on one side only.¹⁰ The jury themselves have a right to come into court and ask for additional instructions; and where, in a civil case, such additional instructions are given in open court, they cannot be regarded as a privy communication to them merely because neither the party complaining thereof, nor his attorney, was present; nor is there any legal obligation upon the court to send for absent attorneys or parties, under such circumstances, and delay proceedings until their arrival.¹¹ But upon the coming in of the jury disagreed,

⁷ *People v. Hurley*, 8 Cal. 392.

⁸ *People v. Hobson*, 17 Cal. 424.

⁹ *Hogg v. State*, 7 Ind. 552.

¹⁰ *Byrne v. Smith*, 24 Wis. 69.

¹¹ *Chapman v. R. R.* 26 Wis. 296.

counsel have no right to request certain instructions for the first time;¹² although it has been held, in Arkansas, that the court may on its own motion, after a jury retires and returns into court, it being the rule that the court may instruct the jury at any time on its own motion for the attainment of justice, the matter being one of discretion not to be interfered with unless in cases of flagrant abuse.¹³

§ 381. Such additional instructions are, however, in great degree subject to the rule against repetitions, as it is held error for a court to repeat several times, on the return of a jury into court to report that they cannot agree, disjointed parts of his charge, since, although "it is well enough, when a jury asks for a particular part of a charge upon an indicated subject, for the court to repeat that part substantially as given, yet when a jury merely disagrees as to the result, after weighing the testimony and considering the charge, it is error in the court to repeat or re-charge disjointed portions of his charge, as in such instance a jury very well may, and perhaps always will, conclude that the court means to have them understand that the matter or question thus disjointedly charged upon is controlling in the case, and will find accordingly."¹⁴ Nor is the court under obligation to reiterate all the charge favorable to the defendant in a criminal case.¹⁵

§ 382. When the jury, in writing, request addi-

¹² *Cady v. Owen*, 34 Vt. 598.

¹³ *McDaniel v. Crosby*, 19 Ark. 558.

¹⁴ *Swaggerty v. Caton*, 1 Heisk (Tenn.) 199.

¹⁵ *Hatcher v. State*, 18 Ga. 464.

tional instructions, and the judge gives them in writing in the absence of counsel, it is held, in New Hampshire, not to be error, provided the application and instructions are filed with the verdict, so as to be preserved in a form to be objected to by either party, if desired.¹⁶

§ 383. Where a court allows an amendment to a declaration after the argument and charge, and then refuses additional instructions applicable to the amendment, it is held error in Massachusetts, if indeed suitable instructions can be given to enable the jury to consider properly the issue presented by the amendment, under the evidence already given;¹⁷ otherwise there should doubtless be a re-trial.

§ 384. Repetitions are proper where they are needful to particularize a general charge in which the law is correctly stated, and show its application to a particular point in the evidence of the facts.¹⁸

§ 385. Changes may also be made by a withdrawal of instructions actually given, which may be done at the instance of the party on whose request they were given.¹⁹ And where an instruction has been given on the concession of the opposite party, that concession may be withdrawn; and then it is the duty of the court to withdraw the instruction, if it be found not to express the law applicable to the case, in the absence of concession.²⁰

¹⁶ *Leighton v. Sargent*, 11 Foster, 120.

¹⁷ *Johnson v. White*, 98 Mass. 333.

¹⁸ *Rogers v. Brightman*, 10 Wis. 64.

¹⁹ *Harrison v. Powell*, 24 Ga. 530.

²⁰ *R. R. v. State*, 29 Md. 443.

§ 386. Jurors have no right to communicate separately with the court, either in writing or verbally, but must come into court all together, if they return for further instructions in a case; and then a prisoner has a right to have further instructions given in his behalf, on his request.²¹

CHAPTER VI.

LEGAL EFFECT OF ERROR.

§ 387. AN erroneous instruction is always, when material, an infraction of the legal rights of parties, inasmuch as every party has a legal right to have the jury properly instructed as to his legal rights in a controversy.¹ And so, if such material erroneous instruction be given, a judgment rendered in accordance with it will be reversed, unless it manifestly appear from the whole record that no prejudice was done thereby to the party complaining, and that the judgment was clearly correct. And particularly in cases depending upon circumstantial evidence, which can seldom be so presented as to be free from doubt entirely, and which, therefore, from their nature require the greatest caution and circumspection both in the court and jury, and in which the judgment of the jury are so conclusive of the case, it is a matter of the greatest importance that the jury are correctly di-

²¹ Fisher v. People, 23 Ill. 283.

¹ Gilkey v. Peeler, 22 Tex. 669.

rected as to the law applicable to the case, for it will but rarely occur that the court can say in such cases that the jury were uninfluenced in their verdict by the misdirection.² And, of course, it is immaterial as to what portion of a cause the misdirection relates, as an error relating to the rule or measure of damages will be as fatal as one of vital relation to the legal right of a plaintiff to recover.³

§ 388. Although it is true, on the other hand, that error will not cause a reversal in most of the states of the Union, if it appears from the whole record that substantial justice has been done,⁴ yet the presumption of injury having been done by the error must always be clearly obviated, or the cause will be reversed. In an action for personal injury by the negligence of a railroad company, the jury, at the instance of the plaintiff, were instructed, that, if the defendant was guilty of wilful misconduct in causing the injury, they were not obliged to confine themselves to the actual damage sustained. On appeal, it was urged that the instruction was error, for the reason that there was no evidence that the injury resulted from wilfulness or wantonness on the part of the company; but the appellee insisted that the appellant was not injured by the instruction, inasmuch as the jury did not award vindictive damages, the amount not appearing to be excessive upon the injury sustained. But the court held, that, as the intention of the jury had been di-

² *Josephine (a slave) v. State*,
39 Miss. 614.

³ *State to use, &c. v. Smith*,
31 Mo. 571.

⁴ *Kennedy v. People*, 40 Ill.
488; *Luke v. Johnnycake*, 9

Kan. 511.

rected to the question of wilful neglect as an element of increased damages, the presumption was that the instruction coming from the court had its due influence, and made its impression on the minds of the jury against the corporation.⁵

And where, on the trial of an indictment for murder in the second degree, the court erroneously instructed the jury that the extreme limit of the penalty for manslaughter was fourteen years' imprisonment, and the prisoner was found guilty of murder in the second degree, it was held that the instruction might have been prejudicial to the prisoner, and the judgment was reversed on this ground.⁶

It must affirmatively appear that the error was not, or else that it could not be, prejudicial, or the presumption of the mischievous consequences thereof will prevail.⁷ And where it even seems that the jury by the evidence would have been warranted, under a proper rule of estimating damages, to find a larger amount, yet if the cause has been submitted with an improper charge as to the rule of damages, it must be reversed, as the court will not take the place of the jury, and say that the verdict would have been warranted under a proper rule.⁸

§ 389. Yet, in general, the correctness of the instructions is not inquired into, if it is clear that, whatever the rulings might be, there could be no different legal verdict in the case upon the evidence adduced;⁹

⁵ *R. R. v. Manly*, 58 Ill. 300.

⁸ *Simmons v. Putnam*, 11

⁶ *Hass v. State*, 17 Ind. 349.

Wis. 196.

⁷ *Rogers v. Brightman*, 10 Wis. 64.

⁹ *Devine v. Martin*, 15 Tex. 25; *Doe, ex dem., v. Riley*, 28 Ala. 165.

or if even there could be a variance in the verdict by a possible exercise of the judgment of a jury, but yet manifestly the verdict actually rendered is right; as, for example, where a verdict for the plaintiffs upon a contract renders immaterial unfavorable instructions upon the question whether the contract had been rescinded;¹⁰ or where a jury is erroneously instructed that they could assess damages severally against a number of defendants in an action of trespass, but before judgment on the verdict a *nol. pros.* is entered as to all except one of them, and judgment taken against this one alone;¹¹ or where the court erroneously instructed the jury as to a waiver of an estoppel, whereas whether the party were estopped or not could not vary the decision;¹² or where the judge had no right to instruct a jury at all in assessing the value of real estate appropriated for a highway, yet did so instruct, and there was evidently no prejudice resulting;¹³ or where the error was merely technical;¹⁴ or where the instruction was not supported by the testimony, but not misleading;¹⁵ or where the instruction bore against the character of plaintiff by implication, but without injury;¹⁶ or where the verdict is manifestly in conformity with the law and the evidence;¹⁷ or where the error operates to the benefit of

¹⁰ Davis v. Elliott, 15 Gray, 90.

¹¹ R. R. v. South, 43 Ill. 182.

¹² Adm'r v. Maloney, 39 Vt. 584.

¹³ Des Moines v. Layman, 21 Iowa, 153.

¹⁴ Boynton v. Holmes, 38 Ill. 61.

¹⁵ Anderson v. Kincheloe, 30

Mo. 520; Blake v. Hedges, 14 Ind. 568.

¹⁶ Armstrong v. Pierson, 8 Clarke (Iowa) 29.

¹⁷ Hassell v. Nutt, 14 Tex. 266.

the party complaining of it;¹⁸ or when the erroneous instruction is immaterial in itself.¹⁹

And the rule is the same even in a criminal case, where no injury results from error.²⁰ And so, where there is no evidence on which to base the instruction, or show its relevancy, the judgment below will not be disturbed because of the error therein, it being not applicable to the facts of the case.²¹

§ 390. Of course, partial error in an instruction, which is of injurious effect, is as fatal as an error extending throughout.²² But where the conclusion of law is correct, a wrong reason assigned for it will not vitiate.²³ And an instruction, though irrelevant and therefore ordinarily harmless, yet leaving a question of fact to the jury, without some evidence bearing upon the matter, is held to be calculated to invite them to wander into the field of conjecture, and to act upon the uncertain suggestions therein to be met.²⁴

§ 391. An irregular remark which introduces the private opinion of the judge, made in charging a jury, which appears to have been favorable to the party complaining of it, or at least not to have been prejudicial, cannot be successfully excepted to as error.²⁵

§ 392. An instruction as to the plaintiff's right of recovery, founded upon an hypothesis of fact which takes from the jury the finding of other facts by which

¹⁸ *Preston v. Leighton*, 6 Md. 88.

¹⁹ *Loudenback v. Collins*, 4 Ohio St. 262.

²⁰ *Mask v. State*, 36 Miss. 77.

²¹ *People v. March*, 6 Cal. 547.

²² *Plank Road v. Hoffman*, 9 Md. 569.

²³ *Rupp v. Orr*, 31 Pa. St. 519.

²⁴ *Bond v. Hall*, 8 Jones L. (N. C.) 16.

²⁵ *McDougall v. Shirley*, 18 N. H. 108.

the right to recover may be impaired or defeated, is of course erroneous, and fatally so. And hence an instruction upon any given statement of fact must always be subordinate to, or in aid of, a theory embracing all the material facts in the case. And it is fatal error to grant an instruction to one party inconsistent with one granted to the other. And it will not obviate the legal effect of the error that the proper instruction is actually given in one or the other, unless in the correct one it is given in such terms as to impose a limitation upon the adverse instruction, so as to make nugatory the error therein contained,²⁶ — the general rule being that the fatal effect of a separate and erroneous charge is not cured by a statement of the true rule of law applicable to the matter, in other portions of the charge given.²⁷ But the rule is relaxed when a proposition, too broadly stated in one of a series of instructions, is properly modified by another. And, in like manner, where an instruction is erroneously refused, the cause will not be reversed for that reason, if manifestly the refusal wrought no prejudice against the party requesting it.²⁸ A series of instructions is to be regarded as a whole; and if thus the law is fairly presented, a defect or impropriety in a particular instruction will afford no ground for reversal.²⁹

§ 393. Instructions must be construed with regard to the evidence; and where they are correct as applied

²⁶ *Adams v. Capron*, 21 Md. 187.

²⁹ *State v. McClure*, 25 Mo. 338; *Shaw v. Saum*, 9 Ind. 517.

²⁷ *Horne v. State*, 1 Kan. 42.

²⁸ *Ruble v. McDonald*, 18 Iowa, 493.

to the evidence, it is no ground for reversal that they are erroneous as universal propositions.³⁰

§ 394. A court cannot refuse to reverse, however, unless it clearly appears from the record that no harm actually resulted from the erroneous giving or refusal of an instruction. But a judgment will not be reversed because of a refusal to grant a proper request, if it appears that the appellant derived all the advantage he sought thereby from an instruction given on request of the opposite party. But where a correct and an incorrect instruction are given on the same subject, the cause must be reversed, where it cannot be ascertained that no injury resulted, or by which instruction the jury were governed in their decision.³¹

§ 395. No matter how injurious an error may be, a party on whose motion the instruction was given cannot be allowed to complain of it, being bound by his own act.³² And in like manner, if a party allows incompetent evidence to be introduced without his objection, he cannot afterwards call upon the court to exclude it by instructions from the consideration of the jury.³³ Nor will a judgment be reversed for error if that error is too favorable to appellant, and consequently could have done him no injury.³⁴ (See § 398, *infra*.)

§ 396. The erroneous admission of evidence will not reverse unless it might possibly have prejudiced the

³⁰ *Miller v. Adm'r*, 29 Ala. 174.

³³ *Dick v. State*, 30 Miss. 594.

³¹ *Haney v. Marshall*, 9 Md. 195 ; *Canby v. Frick*, 8 Md. 163.

³⁴ *Wharton v. Littlefield*, 30 Ala. 245 ; *Chissom v. Lamcool*, 9 Ind. 533.

³² *Flowers v. Helm*, 30 Mo. 324.

opposite party;³⁵ as if the verdict must have been the same had the evidence been excluded.³⁶ Thus where record evidence was improperly admitted to prove a dedication, but the testimony was ample basis for the verdict without this record evidence, the court refused to interfere.³⁷ But if evidence is admitted which might have influenced the jury, the error cannot be cured by an instruction that the evidence is immaterial.³⁸

§ 397. Where a party complains of an omission of what might have been proper to be given, though not strictly demanded by the case in hand, he cannot prevail when he had made no request for a precise charge on the specific point. Thus an agent sold wood of his principal on an agreement that it was in part to be applied to the payment of his own debt, which agreement was set up in defence to an action by the principal, and on the trial the case was treated by the counsel and the court as depending on the authority of the agent to make that agreement, and the jury were instructed that in the absence of any express authority they could only find an implied one from previous transactions of a similar character sanctioned by the principal. It was held that the instruction was not erroneous for omitting to state that a subsequent ratification by the principal would have been equally binding, since the judge was speaking of an actual authority as related to the evidence in the case, and that if the defendant had desired further instruction

³⁵ *Boyd v. Foot*, 5 Bosw. (N. Y.) 118.

³⁷ *Connehan v. Ford*, 9 Wis. 240.

³⁶ *Picker v. Haidorn*, 30 Mo. 96.

³⁸ *R. R. v. Baxter*, 32 Vt. 805.

upon the effect of a subsequent ratification, it was his business to call the attention of the judge to the precise point.³⁹ Unless this is done, the appellate court will not consider an objection to an omission complained of.⁴⁰

§ 398. In New York we find an exception to the rule stated above (§ 395), that a party not objecting to the admission of evidence cannot afterwards have it excluded by instruction, which I judge to be the general rule on principle. But the Commission of Appeals remark in support of an adverse position, "It does not follow that the omission to object to testimony is a concession that it is competent."⁴¹ Quite true, perhaps; but it looks as if it ought to operate as a waiver of the right to object. Suppose that counsel would — as under this principle they would have a right to do — reserve all their objections to the end in a complicated case, relying upon instructions to throw out what was improper; manifestly it would introduce the utmost confusion into a case, even if it were not absolutely impossible by instructions to separate the tangled mass so clearly as to save the jury from hopeless embarrassment. And it scarcely needs to be remarked how a party, consciously having a bad cause, could resort to this method of producing a bewilderment tending to obscure the issues and confuse the jury, and thus defeat the ends of justice.

§ 399. If the evidence shows a different state of facts from those contained in the pleadings, it is held in

³⁹ *Lachner v. Salomon*, 9 Wis. 129.

⁴⁰ *Chappell v. Cady*, 10 Wis. 112.

⁴¹ *Hamilton v. R. R.* 51 N. Y. 106.

Missouri that a party desiring instructions in accordance with the facts must first, by leave of court, amend his pleadings. And an instruction calling for a verdict, yet not covering all the issues in the case, is objectionable unless cured by other instructions.⁴²

§ 400. Courts do not sit as literary critics, and therefore mere verbal inaccuracies, such as the omission of a connecting word, or the word plaintiff inserted where defendant was intended, are no ground of reversal, unless they are shown to have been misleading.⁴³

§ 401. Where the charge of a judge is not relevant to the case, it matters not whether it is erroneous or not; unless it works manifest prejudice, the case will not be reversed thereon.⁴⁴ (But see Chap. IX., *infra*.)

CHAPTER VII.

GENERAL REQUISITES OF INSTRUCTIONS.

§ 402. IT is the province of instructions to give a just, true, and correct exposition of the law, and they must be so framed as not to leave the jury to determine the law in a civil suit; as where the court charged, "We leave the liability, or non-liability, of the defendants to be discovered and determined by the jury from all the facts in the case." This was held

⁴² Budd v. Hoffheimer, 52 Mo. 297.

⁴⁴ Sinclair v. Murphy, 14 Mich. 392.

⁴³ Nichols v. Mercer, 44 Ill. 252.

error, because it left the jury to determine both the law and facts.¹ And an instruction, that if the jury believe certain facts, then "the plaintiffs are not at liberty to establish, by any other evidence than that prescribed by the contract, the quantity," &c., of work done, is liable to the same objection, since it leaves to the jury the interpretation of the contract;² and one referring to them the question whether certain slaves were removed to Kentucky from Indiana in accordance with the laws of the latter state, or of the United States, was condemned on the same ground. And so a charge must not refer to the jury the construction of any provision in a mortgage of which the validity is controverted before them.³ And so instructions should not be given which would leave to the jury the interpretation of an indorsement on negotiable paper, and leave them to determine a case, special in its circumstances, on the face of the paper and the custom of bankers, and leave them to find in a case, where paper was indorsed "for collection," and where paper was frequently, in the course of dealing, sent for collection *only*, because bankers testify that, by the general custom and usage of bankers, negotiable paper so indorsed and transmitted for collection would be held and treated as the property of the banker transmitting it.⁴

§ 403. It is not needful that the entire law applicable to the case be presented, provided there is enough to

¹ Cook v. Mackrell, 70 Pa. St. 12.

³ Price v. Mazange, 31 Ala. 701.

² R. R. v. Resley, 14 Md. 425.

⁴ Sweeney v. Easter, 1 Wall. 166.

attain the ends of justice,⁵ by directing the minds of the jury to the real points in controversy,⁶ and especially if further instructions were not asked for.⁷ Nor is it needful to use the exact language of a statute; and, indeed, an instruction may very closely pursue the language of the statute, and yet be erroneous. It should be so explicit, and have such connection with the facts of the case, as to enable the jury clearly to apply the facts to the law as expounded by the instruction.⁸ But it is not the duty of the court, for this purpose, to illustrate a general proposition of law in every conceivable way, or in any particular manner, without a special request. It is enough if the illustration given does not inculcate any false principle.⁹

§ 404. The legal effect of an instrument admitted in evidence should be explained, and especially if it contains recitals likely to mislead the jury.¹⁰ And sometimes it is held proper to give a jury definite instructions as to the legal effect of one fact singled out of many,¹¹ as the presumption of law arising from possession by a vendor after a sale of property.¹²

§ 405. But there must be no charge on the facts in general, although in stating testimony it seems inevitable to call the attention of the jury to the degree of weight and importance to be attached to particular circumstances, if they are proved; and it is held that

⁵ *Cole v. Cole's Adm'r*, 17 Tex. 6.

⁶ *Hessing v. McCloskey*, 37 Ill. 351.

⁷ *Robinson v. Varnell*, 16 Tex. 387.

⁸ *Ritte v. Commonwealth*, 18 B. Mon. 35.

⁹ *Whitcomb v. Fairlee*, 43 Vt. 671.

¹⁰ *Ballard v. Perry*, 28 Tex. 364.

¹¹ *Grout v. Nichols*, 53 Me. 386.

¹² *Gibson v. Hill*, 21 Tex. 228.

"to say that certain circumstances deserve to be considered, or are entitled to great weight, is not expressing an opinion as to what facts have been proved, but only instructing the jury with regard to the relative materiality and importance of different portions of the evidence; and to assist and guide the deliberations of the jury by such comments is no infringement upon their province, but often a duty necessary to lead their minds to an enlightened and discriminating consideration of the case." And so, where, on the trial of an action by one stock broker against another in regard to dealings in stocks, a jury were instructed that the fact that both parties were brokers, and might be presumed to know the usages of their business, was entitled to great weight, it was held no violation of a statute providing that the jury shall not be charged in regard to matters of fact, but allowing the court to state the testimony and the law.¹³ The limitation in such matters is thus expressed by the Supreme Court of Pennsylvania: "Care should be taken always not to infringe the province of the jury so as to relieve the full responsibility of pronouncing an intelligent judgment upon them for themselves."¹⁴ But it is a necessity that instructions should always be framed with reference to the facts.¹⁵ And it is held in Vermont to be the province of the court to instruct the jury as to what inferences of fact they would be warranted in drawing from the evidence and facts proved, and if the court should not err as to the kind and

¹³ *Durant v. Burt*, 98 Mass. 168.

¹⁵ *Porter v. Harrison*, 52 Mo. 524.

¹⁴ *Ditmars v. Commonwealth*, 47 Pa. St. 337.

extent of such inferences, an exception will not be sustained, even if the matter should be so plain as to render it needless for the court to say anything about it.¹⁶ And thus in South Carolina, where the evidence of a defendant's participation in a trespass was wholly circumstantial, and the verdict was for the plaintiff, it was held no error for the judge to charge that although one or more of the circumstances detached would not authorize the inference of the defendant's guilt, yet that his direction or consent to the trespass might be deduced from all the circumstances, as enumerated in the charge, one of which was, that the defendant, having the opportunity to take the stand and exculpate himself, had declined to do so.¹⁷ In Georgia it was held that it was not error for the court, after having charged the jury as to a presumption arising under a given state of facts not amounting to positive proof of the thing presumed, to add, "But this presumption is not conclusive. It may be rebutted by evidence, and it is for you to determine whether or not it has been rebutted."¹⁸

§ 406. But always the jury must be left free in the determination of facts. They may be guided, but not commanded. And concerning a restriction imposed by an instruction given in a criminal case in Mississippi, the court remarked, "It is said that the second instruction limited the investigation of the jury to the crime of murder, or to the defence of excusable homicide, and that they were not permitted to take into

¹⁶ *Brewin v. Farrell's Estate*, 39 Vt. 210.

¹⁸ *Black v. Thornton*, 31 Ga. 641.

¹⁷ *R. R. v. Partlow*, 14 Rich (S. C.) 237.

consideration the defence of manslaughter, which, so far as the crime of murder is concerned, may be regarded as a defence to the prisoner. The instruction was no doubt intended to leave the jury free to investigate, according to the testimony, the degree of crime of which the accused, if guilty at all, was really guilty; but it must be admitted, at the same time, that the instruction, if taken strictly according to its language, might warrant the construction given to it by counsel, and might have confined the jury to an investigation too limited. The jury no doubt, without the instruction, would have clearly understood their duty, and the question is, whether it tended to cramp their action. In answering this question, we think it barely possible that the instruction could have produced such an effect. Our conclusion upon this point, therefore, is, that while the instruction was wholly unnecessary, and while we are of opinion that it did not in the least influence the jury, and we would not therefore reverse the judgment if this were the only error, yet the safer rule, unquestionably, is, that where the court undertakes to give even unnecessary instructions in this class of cases, the instructions should not be framed so as, even by remote construction, to limit the free action of the jury in considering the testimony before them.”¹⁹

§ 407. Instructions must be confined to the issues and evidence in the case. And where a distinct issue is presented in the pleadings, the court may charge the law in relation thereto, even if the evidence be but

¹⁹ *Cotton v. State*, 31 Miss. 509.

slight on the particular point therein.²⁰ But the pleadings themselves must not be commented on. And where a judge said to a jury that he was "surprised that no demurrer had been filed to the bill, or a motion made to dismiss it, but as no one had made any such motion, he would go on and charge them the law in the case," it was held error, because such remarks were calculated to prejudice the jury in regard to the plaintiff's case.²¹

But it is the duty of the court to state the issues, and not leave it to the jury to ascertain the issues from the pleadings;²² and they may be properly instructed to disregard all evidence not pertinent to those issues, it appears;²³ although it is rather the duty of the court to exclude such evidence, as I judge. And the court should see that particular questions of fact propounded for answer are so framed that each shall distinctly present to the jury a single material fact involved in the issues, and that they are definitely and completely answered if such answer is insisted upon before the finding is accepted as a special verdict.²⁴

It being the province of the court to define the issues which are formed, if there are two issues fairly presented, it is error to rest the decision of the case upon one of them, where there is evidence tending to sustain both;²⁵ and where the court submits issues to

²⁰ *Camp v. Phillips*, 42 Ga. 290.

²¹ *King v. King*, 37 Ga. 205. 502.

²² *Dassler v. Wisley*, 32 Mo. 498

²⁵ *White, Adm'r, v. Gray*, 32 Mo. 447.

²⁴ *Rosser v. Barnes*, 16 Ind.

²⁵ *Bradshaw v. Mayfield*, 24 Tex. 481; *Smithwick v. Andrews*, 24 Tex. 488.

the jury not raised by the pleadings or evidence, the cause will be reversed, unless it is clear the jury were not misled thereby.²⁶

Care must be taken that the instructions are fairly and entirely based on the issues. Thus where, in an action of covenant, the plea in defence is full performance, it is error to instruct the jury so as to raise the question of excuse for non-performance.²⁷ And where, in a suit on an insurance policy, the jury were instructed for the plaintiff, that if they found the representations true as to the title, and if they found other facts to be true, then there was no fraud in that respect, whereas there was no issue of fraud in those respects, although there was as to other matters, it was held a departure from the issue.²⁸

And so issues must not be withdrawn virtually by the instructions; as in an action of deceit, putting the element of fraud — the gist of the action — out of the case;²⁹ or resting a charge on immaterial questions of fact aside from the true issues.³⁰

And where an instruction is too narrow to cover the merits of the controversy, it may be as mischievous as one too broad.³¹

§ 408. And, as above intimated, instructions should be based on the evidence strictly.³² And so, in the absence of proof of malice, it is error to instruct the

²⁶ *Love v. Wyatt*, 19 Tex. 312.

³⁰ *Dunlap v. Robinson*, 28 Ala.

²⁷ *Hooker v. Johnson*, 10 Fla. 100.

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³¹ *Roots v. Lyner*, 10 Ind.

²⁸ *Insurance Co. v. Nelson*, 92.

65 Ill. 416.

³² *Hamilton v. Manuf. Co.* 54

²⁹ *Moffatt v. Conklin*, 35 Mo. Ill. 370.

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jury as to vindictive damages.³³ And in that class of cases sounding in damages, where the evidence is conflicting and presents a difficult issue, especially where the facts are calculated to touch upon the feelings and sympathies, great accuracy should characterize the instructions, which ought to be clear and concise, so as to assist the jury in reaching right conclusions,³⁴ and not in any case lead them to decide upon any grounds except the evidence.³⁵

§ 409. While it is error for a court to withdraw questions of fact in dispute from the determination of the jury, yet it must give them the means of proper guidance. And especially in an important criminal proceeding, and where the cause is complicated, the court should specify to the jury the controverted questions of fact, and give clearly the law applicable thereto.³⁶ And where an error was assigned from "the recital in the charge of the evidence in the case claimed, as the court understood it, by the counsel for the state and the counsel for defendant," the court above remarked, "It does not appear from the record that this was done in any manner tending to prejudice the defendant; nor are such recitals of the respective claims of the parties improper, when fairly made for the purpose only of making a proper application of the law arising in the case, and the jury are left as the unbiassed triers of the issues of fact in the case."³⁷ However, where a fact is made up of different ele-

³³ *R. R. v. Patterson*, 63 Ill. 305.

³⁴ *R. R. v. Van Patten*, 64 Ill. 511.

³⁵ *Matthews v. Hamilton*, 23 Ill. 472.

³⁶ *State v. Brainard*, 25 Iowa, 572.

³⁷ *Mirums v. State*, 16 Ohio St. 233.

ments, these need not be enumerated, unless needful to a clear submission.³⁸

And it is competent for the court to instruct, that, if from the evidence the jury find certain facts are proved, then certain legal consequences must follow, and the law, as applicable to the facts so established, is for the plaintiff or defendant, and that they must find accordingly.³⁹ And the connection and effect of the facts in a case may properly be pointed out;⁴⁰ for to submit a ground of recovery to a jury, without basing it on facts, is repugnant to justice, as well as to law and practice.⁴¹ But where a court instructs a jury upon what state of facts they may find a verdict for a party, the instruction should include all the facts in controversy material to the rights of the parties;⁴² and then the jury must be left free to draw their own inferences from the facts involved.⁴³

§ 410. For it is a settled and necessary rule, that, where an issue is one to be determined on the whole evidence, instructions predicated only on a part of it, so drawn as to have an effect adverse or contrary to the logical inference from the whole, are to be condemned as mischievous;⁴⁴ for it is manifest that it distorts the case by bringing out into undue prominence certain features of it, to select from the evidence an isolated case, and call the attention of the jury to its special consideration, although this may

³⁸ *R. R. v. Porter*, 19 Md. 458.

³⁹ *R. R. v. Skeels*, 3 W. Va. 556.

⁴⁰ *Greeley v. Thomas*, 56 Pa. St. 35.

⁴¹ *Hill v. Canfield*, 56 Pa. St. 458.

⁴² *Gallagher v. Williamson*, 23

Cal. 331.

⁴³ *Ilakelnath v. Stookey*, 63 Ill. 486.

⁴⁴ *Cook v. Carr*, 20 Md. 404.

not always require a reversal.⁴⁵ Thus, where a fact was developed by one witness in the progress of a trial, and at the instance of the plaintiff the jury were instructed that if they believed that fact they should find for the plaintiff, the court above remarked, "This was wrong. Instructions should be predicated upon the whole case, and take in all the evidence. Courts are not at liberty to single out a particular fact, and tell the jury that they must find their verdict on that fact, and thus virtually withdraw all the other testimony from their consideration. The verdict must be founded upon a consideration of all the evidence."⁴⁶

So where two joint defendants, sued as partners, offered a request segregating two instances tending to negative a partnership, and asked the instruction of the court thereon, excluding other evidence which might have induced the plaintiff to believe them partners, it was held misleading.⁴⁷ If the plaintiff's case rests alone on the evidence mentioned in the instruction, it is sufficient; otherwise, not;⁴⁸ and instructions resting alone upon isolated facts, or portions of evidence detached from their connection, should always be refused.⁴⁹ And while the evidence may be stated, yet the conclusions to be deduced therefrom must be left exclusively for the jury.⁵⁰ And it is even held, that, although it may be a rule which juries should observe, that, if possible, all the evidence is to be reconciled, and perjury not be imputed unless where

⁴⁵ *Grube v. Nichols*, 36 Ill. 93; *McCartney v. McMullen*, 38 Ill. 237.

⁴⁶ *Bank v. Currie*, 44 Mo. 92.

⁴⁷ *Folk v. Wilson*, 21 Md. 539.

⁴⁸ *Pearson v. Snodgrass*, 5 Cal. 479.

⁴⁹ *Gray v. Burk*, 19 Tex. 232.

⁵⁰ *Ayres v. Moulton*, 5 Cald.

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such inference is unavoidable, yet it is not in any wise the duty of the court to lay down this rule as a rule of law in submitting the case.⁵¹ The duty of the court is fulfilled by grouping the evidence where it is deemed necessary, and indicating the bearing of its several parts upon the issues to be decided.⁵² To assume what the verdict will be is invading the province of the jury by virtually withdrawing the issues from their consideration.⁵³

§ 411. An instruction should never be argumentative, any more than a pleading. A concise and brief statement of the law is all that ought to be given in any case.⁵⁴ And, on this principle, a comparison of cases therein is to be strictly avoided; as where counsel read a reported case, and then asked the court to instruct the jury that, "unless they believed the facts in the case at bar were stronger and more conclusive of guilt than the facts in that case, the defendant should be acquitted," — which was held to have been properly refused by the court.⁵⁵

§ 412. Mixed questions of law and fact necessarily go to the jury under instructions.⁵⁶ But in submitting such questions, care must be taken not to leave to them the decision as to the law. And, in a case of this kind, the Supreme Court of Mississippi remarked, "This instruction submitted the whole law

⁵¹ *Hall v. Brown*, 30 Conn. 552.

⁵² *Commissioner v. Clark*, 33 N. Y. 267.

⁵³ *Hawk v. Ridgway*, 33 Ill. 475.

⁵⁴ *Merritt v. Merritt*, 20 Ill.

80; *Thompson v. Force*, 65 Ill. 372.

⁵⁵ *Blackman v. State*, 36 Ala. 295.

⁵⁶ *Kent v. Tyson*, 20 N. H. 121.

of the case to be determined by the jury. Whether the plaintiff was the owner of the cotton or not, was a question of law to be determined by the court, after the ascertainment by the jury of the facts of the case. It was the province and duty of the court to direct the jury, that, if they believed from the evidence that such or such were the facts, then the plaintiff was, or was not, the legal owner of the cotton; but to tell the jury that, if they believed from the evidence that he was the owner of the cotton, was to leave them without instructions as to the rules of law to govern them in determining that issue, and to submit the law of the case to them. This mode of giving instructions is destructive of the safeguards which the law throws around legal rights by referring to the courts the determination of questions of law, thereby rendering the rules of property settled and stable, and removing them from the arbitrary caprices of juries.”⁵⁷

§ 413. It is not allowable for a judge, where the character of a witness is called in question on the trial, to make a remark from the bench indorsing his respectability; and if the testimony of the witness is material, the remark is cause for reversal.⁵⁸ But, on the other hand, it was held no error for a judge to remark in his charge that there was “an oddity and want of symmetry in the language [in slander] sworn to by the defendant, which the jury might take into consideration in determining whether the defendant did add said words or not;” the court declaring the true rule to be that “the expression of an opinion by

⁵⁷ *Baldwin v. McKay*, 31 Miss. 366.

⁵⁸ *McMinn v. Whelan*, 27 Cal. 300.

the judge as to the character or effect of evidence, leaving it to the jury, notwithstanding, to decide the question submitted to them, furnishes no ground for exception.”⁵⁹ And a judge may call the attention of the jury to the fact that a party, having opportunity, does not testify in the case, as a matter which they might consider, and give all the weight to which they might believe it entitled.⁶⁰ And, also, it is held that a court may properly instruct the jury, that if they find a witness has knowingly given false testimony in regard to a material issue in the case, they may disregard his entire testimony wherein it is not corroborated.⁶¹

§ 414. It is no ground of complaint that a judge employs strong language in charging a jury. The Supreme Court of Iowa say, “We know of no reason why a court should not call things by their right names, and, if it need be, use strong, if correct, language in criminal and civil cases alike, if by so doing a guilty man is the more surely brought to justice. It certainly is not the fault of the court, but of the party who, it may be, in a thoughtless and unguarded moment, has violated the law of the enforcement of which he now complains.”⁶² And so, where a judge in a charge characterized the crime of robbery an outrage, it was held not calculated unduly to prejudice the cause of the prisoner, or do him an injury.⁶³ But where, on a murder trial, the jury were instructed

⁵⁹ *Maybee v. Fisk*, 42 Barb. Ill. 123; *McClure v. Williams*, 338. 65 Ill. 391.

⁶⁰ *Bank v. Stone*, 50 Me. 595. ⁶² *State v. Vance*, 17 Iowa,

⁶¹ *Rath v. Wells*, 29 N. Y. 149. ⁶³ *People v. Pool*, 27 Cal. 573.

that "The fact that the deceased was a Chinaman gave the defendant no more right to take his life than if he had been a white person; nor did the fact, if you so find that the defendant was seeking to enforce the collection of taxes against another Chinaman, or even against his victim, give defendant any right to take his life; our laws do not sanction the sacrifice of human life in order to enforce the collection of taxes or licenses;" the court held that the court below had no right to use the words "his victim," because it seemed to assume that the deceased was wrongfully killed, which was the point in issue, and calculated to prejudice the prisoner; ⁶⁴ for courts in charging should not, directly or indirectly, assume the guilt of the accused, nor use equivocal phrases which may leave such an impression.

§ 415. It is held a sufficient presentation of the law of a case, where, although a portion of the instructions are objectionable, yet as a whole they are correct, ⁶⁵ for they are all to be taken and construed together. ⁶⁶ Yet it is held in large measure discretionary, and a whole series may be properly refused for a single erroneous request therein. ⁶⁷ A mere want of methodical arrangement will not vitiate, although it is less liable to misconstruction to state the points and the qualifications together in logical connection. If all together contains the correct statement of the law, it will not be held error. ⁶⁸

⁶⁴ *People v. Williams*, 17 Cal. 143. Iowa, 311; *Walker v. Collier*, 37 Ill. 362.

⁶⁵ *Moore v. Sanboim*, 42 Mo. 490. ⁶⁷ *Castner v. Steamboat*, 1 Minn. 73; *Bond v. Corbett*, 2 Minn. 248.

⁶⁶ *Marshall v. Ins. Co.* 43 Mo. 586; *Hamilton v. Bank*, 22 ⁶⁸ *Guerin v. Hunt*, 6 Minn. 375.

On the principle herein stated, if an action be brought against a street-railway company to recover damages for an injury resulting from negligence, and on the trial it appears that the conduct of the plaintiff directly contributed to the injury, so that he cannot recover, and, after the jury retires, an instruction is given them, omitting the element of contributory negligence, which would in itself be erroneous, such an omission therein affords no ground for reversal, if that point had previously been fully met by other instructions, because even in such a case the after instruction must be construed with the former, and all together be considered in their combination and entirety, and not as though each separate instruction was intended to embody the whole law of the case.⁶⁹ But it must be clear that the error is neutralized; for, if instructions stand merely in an irreconcilable conflict, mutually nullifying one another, the rule does not apply; as, for example, where the jury are misdirected on behalf of the plaintiff or defendant, and properly instructed in a series of instructions given for the adverse party, the case will be reversed, unless it appears that the jury could not have been misled.⁷⁰

§ 416. A charge may be general where there is no necessity for a specific instruction on every point separately presented;⁷¹ as where, under the circumstances, the party could not have been benefited by a more specific response.⁷² A substantial answer to a

⁶⁹ *Keon v. Railway Co.* 43 Mo. 405.

⁷⁰ *Baldwin v. Killian*, 63 Ill. 550.

⁷¹ *Patterson v. Kountz*, 63 Pa. St. 246.

⁷² *Deakers v. Temple*, 41 Pa. St. 234.

specific matter is all that is usually required;⁷³ although an instruction must declare the law in explicit and intelligible terms to the jury, upon the points raised by counsel.⁷⁴

Where a more specific instruction is desired, it is the business of counsel to particularly request it, after the general charge, or otherwise;⁷⁵ although even then the court may refuse, provided it appears really unnecessary to charge in detail, when the matter is brought to the attention of the court.⁷⁶

But all vague generalities are to be scrupulously avoided; as, for instance, leaving the jury to determine what acts the law required the plaintiff to perform before he could rescind a certain contract; which is further vitiated, however, by leaving a matter of law to the jury.⁷⁷ And also where, on the trial of a case in which the defendant had withdrawn the plea of the general issue, and filed special pleas, and the court, at the request of the plaintiff, instructed the jury that, by the withdrawal, the defendant had admitted the material averments in the declaration, without specifying what these averments were, it was held misleading and erroneous.⁷⁸

§ 417. Instructions should not only be correct in their propositions of law, but should be expressed in clear and concise language, without the use of mean-

⁷³ *Ins. Co. v. Schreffler*, 42 Pa. St. 188; *Groft v. Weakland*, 34 Pa. St. 304.

⁷⁴ *Savings Inst. v. Weedon*, 18 Md. 321.

⁷⁵ *Skinner v. State*, 30 Ala. 524.

⁷⁶ *Dufell v. Noble*, 14 Tex. 640.

⁷⁷ *Gehr v. Hagerman*, 26 Ill. 442.

⁷⁸ *McClure v. Williams*, 65 Ill. 390.

ingless words, or words tending unnecessarily to embarrass the opposite party.⁷⁹

§ 418. Where a court had given instructions for both parties, and gave an instruction *sua motu*, it was held error to preface it with the oral remark, in the presence and hearing of the jury, that he had concentrated in this one all the others contained, as embodying all the law necessary in the case; whereas it did not present all the law of the case, and withdrew from the consideration of the jury evidence which had been introduced on the trial.⁸⁰

§ 419. It is held that a judge, at any time before verdict, has a right to withdraw or reverse instructions given, even without the consent of the parties to the suit. But, in so doing, he should be careful that thereby the jury should not be brought into doubt as to the law applicable to the question they are to consider. And where, at the request of a plaintiff, an instruction was given to which the defendant excepted, whereupon the plaintiff waived the instruction, and the judge replied, "If the party declines to receive it, I will leave the matter as it stands before the jury," it was held that the jury were not sufficiently instructed to disregard the instruction given, and that, as the matter about which the instruction was given was one of fact for them to consider, they should have been so instructed.⁸¹

⁷⁹ Tush *v.* Newell, 62 Ill. 196.

⁸¹ Eldridge *v.* Hawley, 115

⁸⁰ McEwen *v.* Motey, 60 Ill. Mass. 410.

CHAPTER VIII.

INSTRUCTIONS UNCERTAIN AND INCONSISTENT.

§ 420. WE will now turn our special attention for a while to certain defects heretofore incidentally alluded to, which are pernicious, and generally fatal, although of course subject to the general rule, that defective or erroneous instructions do not constitute a ground of reversal, unless they also are or may be misleading, as ambiguous and inconsistent or contradictory charges are almost sure to be.

§ 421. And so, although an erroneous instruction given to the jury may be afterwards qualified by using apt words to express the true rule on the subject, yet if, upon the whole charge, it is left uncertain what is the rule given or intended to be given, the judgment will be reversed, because the jury may have been thereby misled, even though there may have been express qualifications given, on purpose to guard against misconstructions of the language employed.¹

§ 422. The want of a precise definition is a common ground of uncertainty. And thus, where the charge was as follows: "The plaintiff alleges that he was forced, against his will, to take Confederate money, through fear of personal violence. The rule of law is, that if, through present exciting fear, a person was forced to take, in payment of a debt, Confed-

¹ R. R. Co. v. Stallmann, 22 Ohio St. 1.

erate money, such payment would not be binding on him, and the debt would remain unsatisfied, and he would be entitled to recover the same, with interest; but if he received Confederate money without objection, or without force or present fear of danger, such reception would be a valid payment, and the courts of the country would not disturb such executed contracts. Then look to the proof, and see if the plaintiff, under an exciting state of fear, took the Confederate money contrary to his will. If so, he would be entitled to a verdict; if not, the defendant would be entitled to a verdict:" it was held erroneous, from want of precision. And the Supreme Court thereon remarked, "To hold that every citizen who passed or received Confederate treasury notes, under some general or indefinite apprehension that his failure to recognize the currency would give offence to the government or any of its officers, acted under duress, and that his action can now be repudiated and disowned, would open the flood-gates of litigation, and unsettle all dealings and transactions in this state, in which that currency was employed. It would disturb the repose of society, shake the titles to property, and produce evil results immeasurable and incalculable. Nothing short of duress, in its legal sense, can invalidate executed contracts. Under the law as it formerly existed, it was necessary, in order to constitute duress, that there should be some threatening of life or member, or of imprisonment or beating of the party acting, or his wife, with a view to procure the execution of the deed or other instrument; and the danger existing or threatened was required to be per-

sonal; and danger to goods or property was not sufficient to avoid the deed. Under the law as more recently declared, duress of the property, as well as of the person, is held to be sufficient. It was formerly held, that if the duress was by a stranger, and the obligor was not a party thereto, the agreement could be avoided. But we are not aware of any case in which it has been held that if a party act under 'a present exciting fear,' or an 'exciting fear,' without showing whether the fear was of danger to life, limb, or property, the act can be legally avoided; and we hold that his honor's instructions were erroneous in not defining more accurately the nature of the fear."²

And in like manner, where a court simply charges the jury that "When there is conflicting testimony, it is for you to determine under your oath whom, and what testimony, you will believe," and fails to instruct them as to what rules should be observed in weighing testimony, it is held error.³ And where the charge was, that "fraud will not be presumed from slight circumstances; the proof must be clear and conclusive," it was held likely to mislead the jury into the belief that more stringent proof was necessary than the law requires. The court above remarked, "It is not to be denied that such language has been frequently used by courts, and when used by them it expresses an idea which means no more than that the proof must be such as to create belief, and not merely suspicion; but juries cannot be expected to be familiar with the technical and stock phrases of the bench and bar.

² *Kollings v. Cate*, 1 Heisk (Tenn.) 102.

³ *Wilcox v. State*, 2 Heisk (Tenn.) 110.

And as there is a well-settled popular understanding of the different degrees of proof required in civil and criminal trials as a basis of conviction, a jury instructed to act only on conclusive evidence could hardly fail to suppose they must disregard all balancing of evidence, and require a case absolutely free from any doubt."⁴

It is imperative, in every case, that the principles of law governing the case should be so plainly stated to the jury that they are thereby enabled to comprehend them.⁵ And the court thus comments on an instruction given in a criminal case: "The charge of his honor is very elaborate and learned. He enters into and discusses the distinction between fraud and felony. His distinctions are well and ably drawn, and, to minds practised in such discussions, easy of comprehension, but incapable of being understood by the ordinary class of jurors, whose minds are not trained in scholastic learning."⁶

Clerical errors, however, do not usually vitiate; as where, in a written instruction, the word "plaintiff" is used instead of "defendant," and the word "if" is omitted;⁷ although, if there be such omissions or substitutions as to obscure the sense, it may be error, as it would then fall under the general rule that if, from the language of a judge, either through ambiguity or want of perspicuity, there is good reason to believe that the jury have been misled, the cause will be reversed.⁸

⁴ *Watkins v. Wallace*, 19 Mich. 77.

⁷ *Nichols v. Mercer*, 45 Ill. 251.

⁵ *Lancaster v. State*, 3 Cold. (Tenn.) 343.

⁸ *R. R. v. Chenewith*, 52 Pa. St. 382.

⁶ *Ibid.*

§ 423. Instructions may be, on the other hand, obscure through their number and verbosity. The Supreme Court of Missouri remarked, concerning a series of this class, that "On account of their exceeding prolixity they were not as intelligible as they should have been. Where counsel insist upon offering such a multitude of verbose instructions, the obvious tendency of which is to confuse the jury rather than enlighten or guide them, it would conduce to the administration of justice for the courts to refuse them altogether, and to give, of their own motion, a few clear, precise, and intelligent instructions covering the law in the case."⁹

§ 424. And also from being susceptible of a double construction;¹⁰ as where the word "executed," in regard to a bond, was used in the sense of "delivered."¹¹ Or where the phrase was used, that certain circumstances were "evidence of fraudulent intent on the part of the plaintiff." Herein the court remarked, on appeal, "Now, we think this language is not only capable of being so construed, but would be commonly understood as meaning, not merely that the facts mentioned would be competent evidence, proper to be considered in determining the question of fraud, but would be full evidence of the fraudulent intent of the plaintiff, and such as would require them to find it as a fact. Most juries would so understand it. If the judge tells them that certain facts are evidence of another, they would understand it to mean sufficient evidence, and not merely material, and tending

⁹ *State v. Ott*, 49 Mo. 327.

¹¹ *Ward v. Churn*, 18 Gratt,

¹⁰ *R. R. v. Sanger*, 15 Gratt. 817.

to establish the other. Lawyers acquainted with the rules of evidence, and the different functions of the court and jury, might infer only the latter meaning. But we think a jury would naturally infer the former.”¹²

§ 425. And there may be also a material omission or evasion. And the rule is, that “Any material omission or evasion whatever, direct or indirect, by way of argument or otherwise, or a want of reasonable precision and distinctness in the charge, will be treated as error, except where a refusal would have been proper,”¹³ as to the request of counsel, on which the charge was given. And so — especially in a criminal case, involving life or liberty — it is error if the law be only partially stated, although it is not certain that the verdict would have been otherwise under full instructions.¹⁴

§ 426. But instructions may be, and ought to be, concise. (See § 423, *supra*.) The Illinois Supreme Court remarked, in a case, concerning this matter, “Few instructions are drawn so that a hypercritical reader may not find some fault, or to which further explanations might not be given, which would make the real meaning more full or apparent to the uninformed. ‘Want of care’ means want of reasonable and proper care. Those words are implied and understood by the ordinarily intelligent reader or hearer. But few sentences are ever framed, in our language, where some words are not implied; and especially is

¹² Gillett v. Phelps, 12 Wis. 399. See also McCracken v. Webb, 36 Iowa, 554.

¹³ Hood v. Hood, 2 Grant (Pa.) 235.

¹⁴ Crawford v. State, 4 Cold. (Tenn.) 194.

it so in the composition of our ancient law writers, whose ideas are conveyed in the fewest words possible; and it is for this peculiarity that their writings have been so universally and justly admired.”¹⁵ A mode is always proper which obviates the necessity of stating, and perhaps reiterating hypothetically, each element of the cause of action, before coming to the real point of the instruction.¹⁶

If more full instructions are desired in explanation, to avoid the misunderstanding of language judged to be too concise, it is imperative upon the party interested therein to suggest and ask for more explicit instructions;¹⁷ or even if a generally correct charge is obscure and confused, as to a particular point;¹⁸ or where instructions are indefinite, or not sufficiently comprehensive.¹⁹

§ 427. Instructions which are clear in themselves may be rendered uncertain by an injudicious explanation; as where the jury were instructed that the burden of proof was on the plaintiff, and that his cause was sustained “if upon the proof there was a preponderance of evidence, that is to say, a balance of the probabilities of the case, in his favor.” On this the Supreme Court remarked, “The ‘weight’ or ‘preponderance of proof’ is a phrase constantly used, the meaning of which is well understood and easily defined. . . . But the phrase ‘balance of probabilities,’ used by the judge in his instructions as equivalent to

¹⁵ Warner v. Dunnovan, 23 Ill. 381.

¹⁸ Bast v. Alford, 22 Tex. 229.

¹⁶ R. R. v. Payne, 59 Ill. 542. (U. S.) 190.

¹⁹ Castle v. Bullard, 23 How.

¹⁷ Warner v. Dunnovan, 23 Ill. 381.

the words 'preponderance of proof,' has no well-settled or clearly defined meaning. It is, at best, a vague and indefinite phrase, and would rather lead the jury to infer that they might form their verdict on a guess at the truth, gathered from the evidence, than on a real solid conviction of it, founded on a careful scrutiny and examination of the proof. We cannot sanction an instruction which seems to us to introduce into the practical administration of justice a new phrase of doubtful meaning, which tends to cloud the meaning of that which was before clear and well understood, and to confuse and mislead the jury in the discharge of their duty."²⁰ And so, where a fact which, if found, is conclusive, is spoken of as "tending" or "conducting" to prove, it is held misleading; as in the case of an alteration in a written instrument, and the instruction was, "If the plaintiff (the claimant) has failed to explain this appearance in the deed to the satisfaction of the jury, so as to remove the suspicion, they are to take this into consideration, as evidence tending to show that the deed, in its present form, is not genuine."²¹ And illustrations, as well as explanations, must tend to elucidate, and not to bewilder.²²

§ 428. The following instruction, relative to a contract, was held exceedingly ambiguous. "If the jury find, from the evidence, that the contract was never delivered, so as to become a fully completed contract," &c. And the court said, "What is meant by the ex-

²⁰ *Haskins v. Haskins*, 9 Gray (Mass.) 393.

²² *Whitcomb v. Fairlee*, 43 Vt. 675.

²¹ *Comstock v. Smith*, 26 Mich. 314.

pression 'never delivered so as to become a fully completed contract'? Was it intended to ask the jury to find that the contract was never delivered? If so, why not stop there? And, besides, if it was never delivered, why ask the jury to further find whether its terms were complied with?"²³

And, in regard to the breach of a contract, the following instruction was held obscure and misleading: "If the jury believe, from the evidence and under the instructions, that the defendants committed the first breach of the contract by ignoring their obligations under it, and on account of such breach by the defendants, the plaintiff is entitled to recover for the full amount of the work done by him, at the time the defendants took possession of the building, to be estimated according to the original contract price; if the jury find, from the evidence, that such work has not all been paid for;" — the Supreme Court remarking thereon, "This instruction was obscure, and calculated to mislead the jury. They were left to wander in a field of too much conjecture and indefiniteness in finding whether the defendants had ignored their obligations under the contract."²⁴

§ 429. Where the court refused the following request, in a criminal case, "If the defendant believed that Gardiner had seduced his wife, and such belief was the result of the deprivation of the reasoning faculties, and also believed that he would be justified in shooting Gardiner, he is entitled to such a verdict as will transfer him from the category of sane to insane

²³ *County v. Pitcher*, 36 Iowa, 598.

²⁴ *Society v. Hubbell*, 62 Ill. 163.

criminals," the refusal was held proper; and the Supreme Court remarked, "While we have held that the refusal of a court to give a proper instruction is error, notwithstanding the court has charged the same proposition in substance, unless it informs the jury that the refusal is for this cause, yet we have also held that the instruction so asked must be free from objection. It must not be ambiguous or obscure, or calculated to mislead or confuse the jury. We think this instruction is of that character. The jury are not supposed to be lawyers, and they may very well have been puzzled to know what sort of 'a verdict would transfer a prisoner from the category of sane to insane criminals.' To justify us in reversing a judgment because an instruction, given already in substance, has not been repeated, the language of it should be clear and explicit, and leave no room for doubt or misconstruction."²⁵

§ 430. An instruction may be erroneous in not drawing a distinction between a general and special relationship and duties correspondent; as, for example, in the matter of an agency.²⁶ And in not defining what circumstances or lapse of time will bar a claim under the statute of limitations;²⁷ or what circumstances will constitute such a fraud as a defendant can properly claim to be relieved against.²⁷

§ 431. Where there is a contract between two parties, and, in consequence of the disability of one of them, there is a temporary suspension of the contract,

²⁵ *People v. Hobson*, 17 Cal. 430.

²⁷ *Flack v. Neill*, 22 Tex. 256.

²⁶ *McDonell v. Dodge*, 10 Wis. 110.

and substitution of²⁸ another for the time being, an instruction merely general to the case, and not specifying to which one of these it applies, is held to be properly refused for the uncertainty.²⁸

§ 432. It has been held, that, where a counsel reads clearly and distinctly, in the presence of the jury, a principle of law from the decision of a reported case, and the judge, in his charge, says, "I charge you that the decision just read is law," and proceeds to apply it to the case, without repeating the law of the decision in the hearing of the jury, it is sufficient, — the rule being that, if the law is given in charge so plainly that the jury can have no difficulty in understanding it, whether it is repeated in their hearing by the judge himself, or read by another and sanctioned and charged by him as read.²⁹ No doubt this is correct; but the circumstances would hardly ever fulfil the strict condition of the rule, so that such a practice will never be generally approved by the appellate courts, I judge.

§ 433. We have already seen that instructions are construed together as a whole, and that, if so considered, they clearly set forth the law of the case, an error in some portions will not vitiate. But where they are set forth, and retain merely an antagonistic relation, the error of one cannot be cured by another. The curative instruction must have the effect of virtually withdrawing the one or others containing the error, so far as they are so erroneous at least.³⁰ And,

²⁸ *Chipman v. Adm'x*, 16 Md. 160.

³⁰ *Kirland v. State*, 43 Ind. 154.

²⁹ *Dillon v. McRae*, 40 Ga. 107.

a fortiori, if a court give an instruction which is correct, but afterwards nullified by another, the judgment must be reversed.³¹ And, also, where an instruction is given for one party, and one inconsistent with it for the other, it is misleading and fatal;³² which is apt to be the case where, although not directly antagonizing, yet one has application to one theory, and the other to a different theory. And so the conflict may be, as it were, latent, yet not the less confusing to a jury; as where, in effect, one instruction was, that a plaintiff was entitled to a verdict if certain engineers' estimates were fraudulent, and another was, in effect, that he was not entitled to a verdict even if those estimates were fraudulent.³³

In a case where a party sued a railroad company for the value of a mule alleged to have been killed by coming into collision with a train of cars, the court first laid down the rule concerning common carriers, and then concerning injuries to third persons; and so, in the first place, charged the jury that the company were bound to the utmost care, and then gave this instruction: "The railroad company, in order to prevent injury and destruction to stock on their track, are only bound to use such reasonable care and prudence in running as a prudent man engaged in the same business would use to prevent such injury or destruction." The Supreme Court remarked, "The instruction given for the plaintiff is not reconcilable with that given for the defendant, and the jury were

³¹ *People v. Campbell*, 30 Cal. 316.

³³ *R. R. v. Lafferty*, 2 W. Va. 117.

³² *R.R.v. Blocker*, 27 Md. 285.

left without any certain rule to guide them;”³⁴ which is always necessarily the case where one instruction merely contradicts another without neutralizing it.³⁵ Even seeming conflicts should be carefully avoided, and, it is held, can usually be avoided by stating the facts to which the proposition of law is applicable.³⁶

§ 434. Inconsistencies are apt to arise from inadvertence on the part of the court, inasmuch as the instructions given are usually drafted by the opposite counsel, each from his own stand-point in the case, and are given sometimes after a hurried examination by the judge, and so the jury are involved in doubt and uncertainty. It would, of course, be proper for the jury to return into court, and receive additional instructions; but they too rarely, perhaps, take the trouble to do this, and often do not realize that they may do so properly.

§ 435. They may come, however, with regard to different standards of estimating damages;³⁷ or to different causes of loss in the same matter.³⁸

§ 436. In an action on a guaranty of the payment of a note, the consideration of the guaranty being one dollar, the jury were instructed (1) That, unless the consideration mentioned in the guaranty had been paid, the defendant was not liable; and (2) That he was liable, if his guaranty was the inducement for selling the maker the goods for which the note was

³⁴ *R. R. v. Miller*, 40 Miss. 48;
R. R. v. Kendrick, *ibid.* 388.

³⁵ *R. R. v. Dunn*, 61 Ill. 388;
Kinger v. State, 45 Ind. 521.

³⁶ *Clem v. State*, 31 Ind. 484;
Bradley v. State, *ibid.* 492.

³⁷ *Coal & Iron Co. v. Tilgh-*
man, 13 Md. 85.

³⁸ *Ferguson v. Adm'r*, 1 Met.
(Ky.) 83.

given. These were held repugnant, and because of the omission to state that the one dollar must have been paid, or there must have been some other consideration sufficient to support the agreement.³⁹

§ 437. To vitiate, however, the contradiction must not merely be qualifying in its effect, but vitally antagonistic. And the Supreme Court of Nevada has well remarked that "The rule that a case must be reversed where instructions on a material point are contradictory, is not as unqualified as appellant contends for. If one party asks for an instruction that is given by the court, laying down a rule of law in language too broad and unqualified, and the other side then asks an instruction, which is also given, and which qualifies and limits the former instruction, and in some respects contradicts it, if the second instruction contains only sound law, the conflict between the two instructions is not an error of which the party can complain who obtained the instruction, which was too broad and unqualified. It might be that this was error injurious to the other side, for the jury might not understand that one instruction was a modification of the other, and might be misled by the too broad language of the first. But they could not do wrong by being governed by the modification."⁴⁰

³⁹ *Sears v. Lery*, 19 Wis. 98. ⁴⁰ *Lobdell v. Hall*, 3 Nev. 515.

CHAPTER IX.

INSTRUCTIONS ABSTRACT AND INAPPLICABLE.

§ 438. THE Supreme Court of the United States has declared, in regard to this class of instructions, and the mischievous effects thereof, that "It is clearly error in a court to charge a jury upon a supposed or conjectural state of facts of which no evidence has been offered. The instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the opinion of the court; and if there is no evidence which they have a right to consider, then the charge does not aid them in coming to correct conclusions, but its tendency is to embarrass and mislead them. It may induce them to indulge in conjectures instead of weighing the testimony."¹ And it is held that, in cases where the testimony is conflicting, and the court gives an instruction wholly irrelevant and calculated to mislead the jury, although correct as an abstract question of law, it will be presumed that they were misled thereby, and the judgment will be reversed.² And so a judge may rightly decline using the very words in which an important legal principle has been accurately laid down in another case; for sometimes circumstances attending a trial may render it improper to define a legal principle in the very words that were

¹ U. S. v. Breitling, 20 How. 254; Bank v. Eldred, 9 Wall. 554. ² Norfleet v. Sigman, 41 Miss. 631.

strictly correct in another case.³ And I apprehend a non-observance of this rule is the origin of most inapplicable and abstract instructions.

§ 439. It is not error to refuse to instruct a jury that a conversation not reduced to writing, when, after the lapse of six years, it is detailed by a witness, is to be received with caution; because, if such an instruction amounts to anything, it is a mere abstraction, which the court may in its discretion give or withhold.⁴

§ 440. A charge that, if the conduct of a defendant known to the plaintiff were of such a character as that business men would ordinarily infer therefrom the authority of an agent to borrow money and give a promissory note for it in the defendant's name, he would thereby be rendered liable for the act of the agent in so doing, was held erroneous, "because it would be to make the ordinary inference of business men a test or rule of agency, independent of the agreement of the parties. It would be far more difficult to unravel the intricacy of what acts would be sufficient to create this inference, than to determine whether the declarations and conduct of the defendant were such as, in the opinion of the jury, authorized the plaintiff to believe that he had conferred the power on the agent."⁵

§ 441. All requests for instructions must have these requisites, or the court will not be bound to notice them; namely, they must be written where the statute requires writing, must be applicable to the

³ *State v. Parker*, Phill.(N.C.) 473.

⁵ *Golding v. Merchant*, 43 Ala. 719.

⁴ *Parker v. Fergus*, 52 Ill. 419.

facts in the case, must not assume that to have been proved which is not in proof, and must be correct in law, or at least capable of being made so by a modification given by the court.⁶

§ 442. But qualifications themselves may be abstract and inapplicable by being connected with matters wholly disconnected with the instructions to which they are attached. In a case of this kind, such a qualification was held error; and the court remarked, "In ruling the charge of the judge as erroneous, we would not be understood as denying his right to qualify propositions requested to be presented by him to the jury when they are not strictly legal or pertinent, or when they require some addition or diminution to make them entirely correct, or are unauthorized by the facts in the case; but as the matters involved in the qualification made by the judge were entirely separable from the request made, and substantially disconnected with it, those matters of qualification should have been presented, if authorized at all, not in connection with the instruction requested, but independently."⁷

§ 443. An instruction submitting to a jury the finding of a fact concerning which there is no legal proof, is abstract, and, if material, the cause will be reversed.⁸ Or one which refers to another case, and attempts to point out to the jury the particulars in which it resembled, or differed from, the one in hand, may be properly refused, as a departure from the true investi-

⁶ *Campbell v. Miller*, 38 Ga. 312.

⁸ *R. R. v. Harper*, 29 Md. 336.

⁷ *Doe, ex dem. of Stephens, v. Roe, &c.*, 37 Ga. 292.

gation of the questions before the court.⁹ And it makes no difference that an instruction announces a clear proposition of law; if it departs from the case, and is inapplicable, it will not be sustained.¹⁰ For, as it has been well said by the Supreme Court of Florida, "Courts sit to decide causes, and not to moot points of law; and the court cannot, in the progress of a trial, be required to give opinions or instructions upon general and abstract propositions of law. The court may and should refuse to give an opinion or instruction on such points; and if the refusal to give the instruction asked is appealed from, the appellate court will not interfere, unless it can be shown that the instruction asked was warranted by the testimony, and ought to have been given."¹¹ The matter has been brought up very often in the courts, and, in the great multitude of decisions rendered, there is not a single dissentient voice; and yet counsel persist in trying to support instructions liable to the objection that they are abstract and inappropriate to the case at bar. This must arise from a want of discretion in applying to practice the rule universally approved in this regard. And our leading design herein will be to present illustrations of the principle in its actual bearings on examples afforded by the reports, without noting any further the mere approval by the courts of the doctrine announced thereon.

⁹ *Harvey v. Skipwith*, 16 Gratt. 405.

¹⁰ *Jennison v. Dearing's Executors*, 41 Ala. 290; *Kariger v. Greb*, 42 Mo. 44; *Brownfield v. Brownfield*, 43 Ill. 154; *Express*

Co. v. Parsons, 44 Ill. 313; *Bartholomew v. Ins. Co.* 25 Iowa, 518.

¹¹ *Whitner v. Hamlin*, 12 Fla. 24.

§ 444. It is the duty of a court to apply a proposition of law to the facts of the particular case at bar; and hence the following instruction was condemned as general and abstract: "The jury in this case are instructed that, in any case where a tender should be made in law, if the tender is waived by the party who should receive it, it is quite the same as though it was made."¹² And also this: "All the allegations in the petition which are not denied specifically in the answer, are to be taken as true."¹³

But the consequences of a general unqualified denial of instructions, because of inapplicability, are thus set forth by the Supreme Court of Pennsylvania: "It startles one to hear it unqualifiedly denied that one copartner is not answerable for the wilful torts of others of the firm; that a firm is not to be held responsible for such torts committed by a servant or an agent; that when committed by a servant of his own mere motion, or solely by a member of the firm, the firm is not to be answerable; and that partners can only be made to respond for trespasses in which each is an actor. The affirmative of these positions is the substance of the first three points of the defendant below, and they were negatived without a qualifying remark. It is quite possible that they were inapplicable to the circumstances of the case, at least deemed to be so by the learned judge; but while they were true as general propositions, it would have been much better to refuse to charge as requested by a qualification of inapplicability. Indeed, I doubt much

¹² *Turner v. Loler*, 34 Mo. 461.

¹³ *Coal & Oil Co. v. R. R.* 45 Mo. 85.

if the general denial did not mislead the jury in this case.”¹⁴

§ 445. An instruction concerning an implied agency, namely, “If any person publicly acts, with the knowledge of another and without objection, as the general agent or manager for that other, such principal will be bound by the act of such agent, although he may not approve of the particular acts of such agent,” was held to be an abstraction merely; because there was no evidence of any general agency, including authority to compromise claims, — which was the point in dispute, — nor of any acting in this way with the knowledge of the principal, who, on the contrary, disavowed the act as soon as he heard of it.¹⁵ And, again, where the court refused the following instructions, the refusal was held proper on the same ground; namely: “The jury are instructed, as a matter of law in this case, that a principal is only bound by such acts of his agent as are in the line of his agency; and if an agent does things outside of his agency, and not within its legitimate range, then his principal is not bound by such of his acts as are thus outside of his agency.

“An agent should act fairly by his principal; and any acts of fraud on his part, known to the person or persons who seek to bind the principal, cannot bind the principal as to such fraudulent acts;” — whereas, on the evidence, there were no acts outside of the scope of the agency, nor any acts of fraud.¹⁶ And

¹⁴ McKnight *v.* Ratcliffe, 44 Pa. St. 164.

¹⁶ Holden *v.* Hulburt, 61 Ill. 282.

¹⁵ Dwyer *v.* Dunbar, 5 Wall. 319.

where the instruction was given that, "If the jury believe, from the evidence, that A was the general agent of B, then no private instruction given by B to A can affect C;" while there was no evidence that A was general agent of B, but only a bailee of a promissory note for safe-keeping, without any authority to receive payment.¹⁷

And where trustees were authorized to build a school-house for a specified amount, without a sufficient fund for that purpose having been provided by the district, instructions to the effect that, if the trustees, without authority, went beyond the funds actually provided, the resulting indebtedness was not binding on the district, were held abstract, and were refused. This being assigned as error, the ruling of the court below was sustained thereon.¹⁸

§ 446. Where the president of a bank acted also in the private capacity of a pork dealer, and it was claimed that a debt due the bank had been paid to him in hogs, as the agent of the bank, and instructions were given (1) That payment may be made in any thing or article which the party to whom the claim or debt is due is willing to receive in payment; (2) That payment may be made to an agent as well as to the principal debtor, when the authority of the agent goes to the extent of collecting and receiving the payment, — the Supreme Court say, "We need not decide whether a bank can receive hogs, or anything but money, in payment of bills held by it in the course of its business. There was no shadow of evidence tending

¹⁷ Burns v. Kelley, 41 Miss. 342.

¹⁸ Sanborn v. School District, 12 Minn. 37.

to show that anything but money had been paid. The hog transaction, it was not questioned by the evidence, was with Alexander in his private capacity as a pork dealer, and not as president of the bank; and there was, therefore, nothing in the case to call for an instruction that payment could be made in any article which the creditor was willing to receive as payment; and it could only tend to lead the jury to confound the private hog transaction between the defendant and Alexander with the transactions between the defendant and the bank through Alexander acting as its president. Instructions should be pertinent to the case. Juries are apt to assume, and are justified in assuming, that they are applicable. This could only be so upon the ground that Alexander, acting as a pork dealer, was doing business for the bank; and, unless the jury utterly disregarded the instruction, it could hardly fail to mislead them. It tended to induce them to confound Alexander's private transactions with his official acts, when the case demanded that the two characters should be carefully distinguished and kept separate."¹⁹

§ 447. As to presumptions of payment, the following instruction was given, and held error: —

"If the jury believe, from the evidence, that there was a payment made on the note sued on, on the twenty-sixth day of January, 1859, and that there is no evidence to show by which particular obligor the payment was made, you may, as a matter of law, presume it was made by the parties jointly chargeable

¹⁹ *Hays v. Hynds*, 28 Ind. 536.

with the payment;" — whereas there was no other evidence of payment than the indorsements on the note; which, the court remarked on appeal, "were utterly worthless to prove either that the alleged payments were made, or by whom made, or when made," — there being a plea of the statute of limitations. And the court further quote from *McGehee v. Greer* (7 Porter, 537): "A payment on a note is, we think, precisely equivalent to an admission that at the time of the payment the debt is due; but it is necessary that the party relying on such payment should prove the date of the payment. To permit that fact to be established by the credit entered on the note would be manifestly allowing the party relying on it to make evidence for himself."²⁰ And so an instruction is bad which goes on the idea of payment, or satisfaction, or usury, where there is no such issue raised by the pleadings.²¹

§ 448. An instruction is improper, based on excluded, instead of admitted, testimony.²² So, where an execution and certain process were excluded, and several instructions were given in relation to the validity of the execution, and refused as to the validity of the process, the instructions were declared by the Supreme Court to be out of place, having nothing to rest on.²³ Or where a correct instruction in point of law is calculated to induce a jury too readily to adopt the conclusions of facts supposed, without considering

²⁰ *Knight, Adm'r, v. Clements*,
45 Ala. 100.

²¹ *Camp v. Heelan*, 43 Mo.
592

²² *Pleasants v. Scott*, 21 Ark.
375.

²³ *Atkinson v. Gatcher*, 23
Ark. 106.

sufficiently whether there is evidence to warrant the adoption of all those conclusions,²⁴—or founded on an issue not raised by the pleadings, it is error.²⁵ And so, if it is founded on a passage in a petition stricken out, although the party offering the instruction excepts to the striking out;²⁶ or relates merely to points made in argument where those points are not in issue;²⁷ or relates to hearsay evidence in such a manner as to be calculated to lead the jury to affix the character of hearsay to the evidence given by witnesses as to what was said by the parties, at the time of making an agreement, as to the character and quality of the subject of the agreement; as, for example, land;²⁸ or set out the distinction between positive and negative evidence so as to mislead a jury to believe, in a criminal case, that the evidence of those who testified that the prisoner did not strike the blow is to be regarded as negative evidence, in the legal sense, and thereby to give it less weight than it is entitled to.²⁹

§ 449. As to liabilities of railroad companies to an employee, for injury received in removing a car in want of repairs, the following instructions were refused, and the refusal sustained: (1) If the plaintiff received the injuries complained of through the negligence or improper conduct of a fellow-servant in the employ of the defendant, the plaintiff is not entitled to recover. (2) A servant who sustains an injury

²⁴ *Austin v. Lalk*, 26 Tex. 130.

²⁵ *Ray v. Sellers*, 1 Duv. (Ky.) 256.

²⁶ *Gilbert v. Mosier*, 11 Iowa, 499.

²⁷ *Piatt v. People*, 29 Ill. 72.

²⁸ *Sikes v. Baer*, 8 Clarke (Iowa) 369.

²⁹ *Coughlin v. People*, 18 Ill. 268.

from the negligence of a superior agent engaged in the same general business, can maintain no action against their common employer, although he was subject to the control of such superior agent, and could not guard against his negligence or its consequences.

(3) A servant cannot recover from his employer for an injury resulting from an order given by an agent or fellow-servant who had no authority to give it;”—the only issues which were formed being, (1) Whether or not the plaintiff, when he attempted to move the car, was ignorant of the unsafe condition of the machinery; and, (2) What damage, if any, he suffered from the injury complained of. The court remarked, “No issue was made or tendered which involved an inquiry whether the plaintiff received the injuries complained of through the negligence or improper conduct of a fellow-servant or superior agent in the employment of the defendant. If the defendant had desired to set up as a defence that the order to move the car was not given by the defendant, but by the foreman of its blacksmith shop, it should have made the proper averments to that effect in the answer, that an issue might be framed on that point. No such issue being made or tendered, the instructions which were refused were irrelevant.”³⁰

Where an injury occurred by a collision on a railroad, a number of abstractions are thus summarized by the court: “They asked the court to instruct the jury that, if the injury was occasioned by the negligence of the Galena and Chicago Union Railroad

³⁰ Conlin v. R. R. 36 Cal. 411.

Company, they would find for the defendants. This the court properly refused, as there was no evidence to base it upon. That company was running its train on time. The train was at the proper place on the road, and was in no fault. They asked the court to instruct that, if they believed, from the evidence, that both parties were guilty of negligence or want of care, they should find for the defendants. The court properly refused this instruction, as there was no evidence of negligence or want of care on the part of the plaintiff. They asked the court to instruct the jury that, unless they believed, from the evidence, that defendants' train was not entitled to the road when the collision occurred, they should find for the defendants. The court properly refused this instruction, as there was no evidence tending to show that they were entitled to the road; but all the evidence showed that they were not entitled to it when the collision occurred. They also asked the court to instruct the jury that, if they believed, from the evidence, that the Galena and Chicago Union Railroad Company had the sole control and regulation of the time and manner of running all trains on the road where the accident occurred, and that defendants' train at that time was run according to such rules and regulations, and that it occurred by, or was the result of, following such rules, then the Galena and Chicago Union Railroad Company are liable, and they should find for defendants. This instruction was also properly refused. It assumed that the defendants were running on time when the collision occurred, when the evidence shows they were not; and there was not a par-

ticle of evidence tending to show they were running in conformity to the regulations of the road. To have given any of these instructions would have tended to mislead the jury, and bring before them mere abstract propositions.”³¹

§ 450. Parties are not allowed to hypothecate a case not sustained by evidence, and call upon the court to give an opinion upon the legal effect of such supposed state of facts.³² And where a position is true in some degree and for some purposes, yet if given unqualifiedly, as requested, it is not true, and is calculated, if so stated, to mislead the jury, an instruction thereon should be refused; as, for example, where a request is to charge that “the contract between A and B, taken in connection with the other evidence in the case, made them partners,” it ought to be rejected, unless the contract and the evidence make them general partners, or else qualified to make the partnership specially relate to the matter in controversy.³³ And where an instruction is partly abstract and partly applicable, a court is not bound to dissect it and give the portion which is appropriate, but may reject the whole.³⁴ Or it is a proper ground for refusal, that it may be correct in one sense, but erroneous in another. Thus, where suit was brought for the value of a mare killed in the night on a railroad track, and an instruction was that “the mere fact of the mare being killed on the track is evidence of

³¹ *R. R. v. George*, 19 Ill. 518.

³² *Whitney v. Goin*, 20 N. H. 357.

³³ *Atherton v. Lilton*, 44 N. H. 456.

³⁴ *Rathbone v. Ins. Co.* 31 Conn. 205.

negligence on the part of the company," the court say, "If by this instruction was merely meant that the fact of the mare being killed on the track was a circumstance which the jury had a right to take into consideration, in determining the question whether the fences and cattle-guards were good and sufficient, it would be unobjectionable. But the jury could not well have understood it in that qualified sense. They would doubtless consider it as meaning that if the mare was killed on the track, that fact of itself would prove negligence on the part of the company. . . . Instructions should be framed with reference to the circumstances of the case on trial, and not expressed in abstract and general terms, when such terms may mislead, instead of enlightening, a jury." ³⁵

§ 451. A charge as to adverse possession is out of place where a claim is not contradicted in the evidence nor the possession. ³⁶

§ 452. There is a singular illustration of the injurious results of an instruction framed without a just basis of the evidence, in a case of assault and battery, where the theory of the instruction was, that first the defendant assaulted the plaintiff, and the first encounter being ended, a new and independent assault — of which there was no evidence — was made by the plaintiff upon the defendant. The injuries sustained were shown to be unprovoked, and most brutal — the defendant, having thrown plaintiff on the floor, continued to strike him, breaking his ankle, and the small bone of the leg, which confined him to the house four

³⁵ *R. R. v. Utley*, 28 Ill. 412. 378; *Knox v. Easton*, 38 Ala.

³⁶ *Bower v. Earl*, 18 Mich. 356.

or five weeks, obliged him to use crutches for several months, during which he was unable to work, and left him with a stiff and enlarged ankle for life. The verdict was twenty-five dollars, on which the Supreme Court remarked, "Such verdicts are a disgrace to the administration of justice. The jury that found this one must have thought that to wantonly assault and brutally beat a man is little more than an innocent pastime. We trust that, upon another trial, the case will be passed upon by a jury that has a juster appreciation of its duties."³⁷

§ 453. The following instruction (refused) on the matter of fraud was held not to be correctly stated, as a rule of law; but even so, it was at best a mere legal abstraction. "That every grant or conveyance of goods and chattels by writing, or otherwise, had or made, or continued to the intent or purpose to delay or prevent creditors from reaching the goods and chattels in satisfaction of their lawful debts, is absolutely void." It was held incorrect in two particulars, considered as a statement of law, namely: (1) The statute uses the word "contrived," not continued [a clerical error in the instruction, probably], and uses, in connection therewith, the words "of malice, fraud, covin, collusion, or guile, to the intent or purpose to delay, hinder, or defraud creditors of their just and lawful actions," &c. (2) Both parties must have the intent to delay, &c. But even if these had been rectified, the instruction would still have been objectionable as abstract.³⁸

³⁷ Gibson v. Webster, 44 Ill. 484.

³⁸ Hessing v. McCloskey, 37 Ill. 352.

And so an instruction is abstract, which, when a breach of warranty is in issue on an alleged internal and secret unsoundness, charges in regard to a "plain and perceptible " disease.³⁹

And the following (given) as to false and fraudulent misrepresentations, when there was no evidence tending to show any such representations in connection with the sale or afterwards: "If after the defendant purchased the machine of A, the payee induced the defendant to give this note by false and fraudulent representations with regard to the machine [a threshing machine], or as to its qualities, this would entitle the defendant to a verdict."⁴⁰

And so where the court was asked to charge that "uncommon stipulations or clauses in a bill of sale are badges of fraud," and that "uncommon or unusual circumstances or conduct in the mode or manner of the sale or transfer are badges of fraud," and there was no evidence of any such circumstances, the refusal was held no error.⁴¹

And so an instruction in replevin, charging concerning wrongful detention, when this was not brought into issue by the pleadings, was held to have been properly refused, notwithstanding wrongful detention was the gist of the action.⁴²

§ 454. In a case of manslaughter, four different instructions were requested, which, in a variety of ways, charged that if there was a struggle between the accused and the deceased for possession of the

³⁹ Herndon v. Bryant, 39 Miss. 337.

⁴⁰ Moffit v. Cressler, 8 Clarke (Iowa) 124

⁴¹ Derby v. Gallup, 5 Min. 139.

⁴² Draper v. Ellis, 12 Iowa. 318.

gun, and it was discharged in consequence of the struggle, the jury should acquit. The refusal was assigned for error, but sustained in the appellant court because there was no evidence of any such struggle, although there was some evidence that the deceased had hold of the gun when it was discharged.⁴³ And in a similar case, three instructions were offered and refused, which related to the law of self-defence, whereas there was no evidence whatever that the killing was done in self-defence.⁴⁴

§ 455. Where a tenancy expired and was renewed in a definite agreement for an extension for one year, and afterwards, in an action of forcible detainer, instructions were offered relating to a tenancy from year to year, these were held properly rejected, because there was no such tenancy in controversy.⁴⁵

§ 456. A plaintiff sued for damages in levying on fruit trees shipped by him to A, and landed, at A's order, on a certain wharf, and claimed that the trees were not paid for, and not subject to A's debts for want of delivery, and asked two instructions. (1) That a man who is insolvent, for the want of means to pay his debts, is in law insolvent without reference to any property in another state. (2) That a delivery at the wharf is not sufficient, unless notice be previously given to the vendee of their arrival; and that sufficient time be allowed to enable him to receive and remove them. Both, on refusal, were held by the appellate court to be not strictly correct, and moreover abstract;

⁴³ *Murphy v. People*, 37 Ill. 458.

⁴⁵ *Secor v. Pestana*, 37 Ill. 530.

⁴⁴ *State v. Rose*, 32 Mo. 356.

the first because there was no proof of the insolvency of A, and the second because no basis of evidence was laid for the doctrine of stoppage in transitu.⁴⁶

§ 457. The following instruction (refused) was held abstract where there was no evidence of a want of consideration. "That a promise by A to pay B in this suit his demand against C without some valuable consideration for such promise, would in law be void, and cannot be enforced in a court of justice."⁴⁷

And so, an instruction which assumed a suretyship from mere spoken words, where the law required a suretyship to be expressed in writing.⁴⁸

And so, concerning a set-off, on which no question of law had been raised.⁴⁹

And so, concerning a contract in regard to interests in lands, evidenced in writing, where there was no dispute as to a verbal contract.⁵⁰

And so, concerning evidence of handwriting by comparison, when the testimony was that of experts, based on a knowledge of the handwriting of the defendant.⁵¹

§ 458. Where a plaintiff was employed to make a number of carts, which was done, and the carts put under a shed, and consumed by fire breaking out, and in a suit for the price of the carts, this instruction was given: "If the jury believe, from the evidence, that the work was to be done by a specified

⁴⁶ *Thompson v. Paige*, 16 Cal. 79.

⁴⁷ *McCown v. Schrimsp*, p 21 Tex. 25.

⁴⁸ *Lombard v. Martin*, 39 Miss. 151.

⁴⁹ *Ocheltree v. Carl*, 23 Iowa, 396.

⁵⁰ *Huffman v. Ackley*, 34 Mo. 279.

⁵¹ *McGregor v. Armill*, 2 Clarke (Iowa) 34.

time, and that the work was done at the time specified, and ready for delivery, and the defendant had notice that the work was ready for delivery, then it was not necessary for the plaintiff to offer to deliver the work to defendant before his right of action accrued," whereas there was no evidence of notice, the instruction was held improperly given. And in the same case was an instruction offered for the defendant and refused, that if the jury believed, from the evidence, that the defendant tendered to the plaintiff, &c., whereas there was no plea of tender, and tender could not be proved under the general issue, because repugnant thereto, the general issue denying liability, and the tender admitting it.⁵²

§ 459. An instruction concerning the general custom of merchants upon the Mississippi and its tributaries, when the evidence before the jury was as to the custom of merchants of three only of the important commercial cities within the designated district of country, was held erroneous.⁵³ And so, in a certain case, the following instructions were held properly refused, namely: —

"If it appears, from the testimony, that the plaintiff was not a manufacturer of the goods in controversy, but a jobber or dealer, and if you find, from the testimony, that A, himself a jobber, was aware of the plaintiff's character and situation as a mere dealer, then, in determining the question of the merchantable character of the goods, in the absence of any express agreement, you will consider this term,

⁵² McIntyre v. Kline, 30 Miss. 367.

⁵³ Walsh v. Frank, 19 Ark. 271.

'merchantable,' as known, applied, and understood between dealers or jobbers in glass.

"Merchantable glass means that the glass, in its condition and appearance, conforms generally to what would be understood by the trade, or by glass merchants, as merchantable glass.

"If you find it to be the rule among dealers, that glass put up in good boxes, and which does not rattle when handled or shaken, is regarded as merchantable glass, and it is fairly shown by the testimony that the glass was in that condition at the time it was shipped by the plaintiff on board the steamer at Pittsburg, then defendants are not entitled to any allowance on account of the unmerchantable character of the glass when it reached Burlington, if the shipment was made according to order." These being based upon the supposition that evidence was introduced tending to show what was understood in the trade by the terms "merchantable," "well-packed," and "in good order," and there being only the individual opinions of the plaintiff and two other witnesses, as to this point, the instructions were held inapplicable to the evidence.⁵⁴

Where an instruction was requested and refused, that the plaintiff could not recover for loss of good will, it was held that the refusal was correct, inasmuch as the plaintiff did not ask damages for the loss of good will.⁵⁵

§ 460. Where the keeper of a public ferry was sued for injury to animals, by his negligence in trans-

⁵⁴ King v. Nelson, 36 Iowa, 512.

⁵⁵ Weber v. Kingsland, 8 Bosw. 440.

porting them, as a public carrier, it was held that the court erred fatally in giving instructions wherein the liability of the defendant was made to rest on the assumption of a special contract for conveying the animals, by which means a new rule of negligence, and damages thereon, was introduced.⁵⁶

§ 461. In a case of burglary, these instructions were asked, and held properly refused: "That the entry of an instrument used only in making a breach into a house is not such an entry as will constitute burglary." "That the entry through the roof with the feet is not a sufficient entry to constitute burglary when the foot is only used to make a breach," since there was no evidence that the prisoner made an entry with an instrument used only in making a breach into the house, or with his feet in like manner, but the breaking and entering alleged were effected by going down the chimney.⁵⁷

§ 462. Where a court was asked to instruct the jury that if the defendant was obliged to pay the instalment sued for, he would not lose the amount, as he could recover it from a third party by another suit, it was held properly refused, as being entirely outside the issue the jury were to try, namely, the promise of the defendant to pay the instalment.⁵⁸

§ 463. Where an instruction was based on the assumption of carelessness of a railroad company in employing servants, it was held error in the court to have given it, when there was no issue to which it

⁵⁶ Hall v. Renfro, 3 Met. (Ky.) 55.

⁵⁸ Manuf. Co. v. Bartram, 31 Conn. 145.

⁵⁷ Donohoo v. State, 36 Ala. 283.

could be applied, neither the pleadings nor testimony containing anything whatever concerning carelessness in the employment of servants.⁵⁹

§ 464. But the court will not regard the evidence as much or little in the giving of instructions. If there is any evidence, though slight, to support them, they should not generally be refused.⁶⁰ And where an abstract instruction is actually given, yet if it be evidently not prejudicial, but harmless, a cause will not be reversed thereon, according to the general rule, that a neutral error does not vitiate.⁶¹

§ 465. An instruction is erroneous which requires a jury to find a fact not in issue; as, for example, that a note sued on had been executed by defendant's intestate, whereas the execution of the note was not denied; the instruction being likely to lead the jury to believe that the plaintiff had not established his cause of action, having offered no proof of the execution of the note, and so to mislead them into finding a verdict against him on that ground.⁶²

⁵⁹ *Deppe v. R. R.* 36 Iowa, 57. Adm'r, 38 Ala. 49; *McNeill v.*

⁶⁰ *Hofelman v. Valentine*, 26 Arnold, 22 Ark. 481.
Mo. 393.

⁶¹ *Quint v. Silver Mining Co.* ⁶² *Orth v. Clutz*, Adm'r, 18
4 Nev. 308; *Russell v. Erwin's* B. Mon. 226.

CHAPTER X.

INSTRUCTIONS ASSUMING FACTS.

§ 466. WE come now to a somewhat correlative matter, and yet distinctive, which has been thus defined by the Supreme Court of Maryland: "The assumption of a fact by the court is materially different from giving instructions to the jury without any evidence to support them. To assume a fact is to state as proved that which is to be proved; as 'if the jury find that after the sale' assumes the fact of the sale, and is therefore erroneous. But to instruct the jury upon an hypothesis of which there was no evidence, is to leave them to assume or find that for which there was no foundation. The errors, though closely similar, are by no means the same. The one is generally incidental and casual, the other is fundamental, deliberate, and conclusive, and has always been held to be error, for which the judgment would be reversed."¹ And it matters not how plain the evidence may be; the court is not thereby justified in assuming a disputed fact. Thus, in an action for negligence of a railroad company, where the defence was contributory negligence in the custodian of the injured child, instructions were asked, on which the Supreme Court remarked, "To give the instructions asked would have been, to a great extent, taking the case from the jury, by assuming the existence of ma-

¹ Mayor, &c., v. Trimble, 25 Md. 34.

terial facts in the case. The court could not say to the jury that the failure of the girls to look in the direction of the gravel train, when approaching or standing upon the track, was carelessness such as should prevent a recovery, without assuming the existence of material facts in the case, which it was for the jury to find. The instructions asked assume the agency of the elder sister, and assume the non-existence of any facts or circumstances rendering it prudent or proper for her to omit looking out. These were matters for the jury, and could not be found or assumed by the court, no matter how plainly they might have been proven.”²

§ 467. The rule, however, is confined to disputed facts, and the court has a right to assume facts uncontroverted; as, for example, if both parties assume that certain grading has been done by competent authority, that the work was charged to the owners of the adjoining lots, and that the defendant owned the lots, there is no error in the treatment of these matters by the court in the same manner.³ And so, where an instruction was objected to in the appellate court because it assumed the insolvency of a vendor, from whom the defendant derived title, at the time of the sale, and it appeared that this insolvency was not denied in the court below, and there was no conflict of evidence on the subject, it was held no error.⁴

§ 468. Sometimes the fact assumed is inferential; and, concerning this, the Supreme Court of North

² *R. R. v. Snyder*, 24 Ohio St. 678.

⁴ *Hughes v. Marty*, 24 Iowa, 501.

³ *Morse v. Gilman*, 18 Wis. 385.

Carolina has said, "There are possibilities different from the inference intended to be drawn, which surround every evidentiary fact in a cause; but for a judge to note one such possibility, and specially call it to the attention of the jury, would be giving it weight to which it is not entitled, and inviting the jury to draw from the fields of conjecture the material for making up a verdict."⁵

§ 469. The correctness of the legal principle contained in an assuming instruction will not atone for the error. The mischiefs resulting from using a correct legal proposition as a cloak for an attempt to decide facts for the jury, are well set forth in an early decision of the Iowa Supreme Court: "Assuming the facts in the case to have been fully proved, as claimed by defendant's counsel, these instructions contained no erroneous proposition of law. Abstractly considered, they would be correct; but when considered in connection with the facts in the case, they were calculated to exert too strong an influence against the plaintiff. They assumed facts to have been proved which were in dispute, and to be decided by the jury. They take for granted, or assume to decide, facts which were neither admitted by the pleadings nor proved by the evidence. They take for granted that the purchase was unconditional, upon adequate consideration, and without notice of fraud. Such instructions are calculated to mislead the jury, and, although they state the law correctly, they charge too strongly upon the facts. So far as facts are concerned, the jury should be left free from

⁵ *State v. Clara (a slave)*, 8 Jones L. 27.

any influence by the court. These instructions appear to have been worded with a particular reference to the influence they would be likely to have upon the jury in deciding the facts. Nothing would be more likely to exert an undue influence on a jury than the positive and decisive language contained in the instructions in reference to the facts. Before the instructions were asked, the court had charged the jury fully and correctly upon the law of the case, and left the facts with them, where they legitimately belonged. But defendant's counsel very adroitly managed to decide these facts for the jury, in the instructions, so gilded and embellished with a correct statement of the law as to obstruct the discrimination of the court, and especially calculated to mislead the jury. Great care and discrimination should be exercised by *nisi prius* courts, in submitting such instructions as are requested by counsel, for, when approved and repeated by the judge, the jury take it for granted that the facts, as well as the law of the case, are to be decided accordingly. Most jurors are glad to escape the trouble of an investigation, and the perplexity of deciding, and are more than inclined to adopt any judicial decision or intimation that may be submitted to them. Hence great caution should be exercised, and jurors should often be admonished by the courts that they alone are to investigate and decide the facts in the case submitted to them.”⁶

§ 470. This instruction was offered and refused in an action for non-delivery of oil, which was lost by a rise of a stream. “The plaintiff, having neglected to

⁶ *Luman v. Kerr*, 4 *Greene* (Iowa) 160.

come for the barrels, and pay for them, at the time of the first or second rise in French Creek, cannot recover damages for the non-delivery of the barrels;" and the refusal was sustained, because negligence on the part of the plaintiff was assumed therein, although controverted.⁷

§ 471. And another form of assumption is where this language is employed in setting out: "When the defendant has shown, or shows," &c. The Supreme Court of Alabama say of this, "Such language, when used in reference to conflicting testimony before a jury, is always improper. The court cannot predicate or assume that any fact embraced in the issue has been shown or proven. The jury, under our system, is the only tribunal which passes on controverted facts in courts of law, and, until the verdict is rendered, no such fact is established or shown to exist."⁸

And so a charge which instructs the jury that they may infer a prisoner's guilt from certain facts hypothetically stated, "and other circumstances," is erroneous in assuming the existence of other circumstances in the case, instead of leaving the jury to decide upon the credibility of the evidence tending to prove them.⁹

§ 472. In an action for breach of promise of marriage, the court gave this instruction: "It was not necessary that the plaintiff should prove an express promise on her part to marry the defendant, but it may be inferred, from the fact of her making no ob-

⁷ Cullum v. Wagstaff, 48 Pa. St. 302.

⁹ Thompson v. State, 30 Ala. 28.

⁸ Gresham v. Tucker, 28 Ala. 611.

jection at the time, carrying herself as one consenting and approving, receiving his visits as a suitor, writing letters to him, and such like circumstances indicating her assent. Her readiness and willingness to perform may be proved by her conduct and expressions, and preparations for the marriage." It was held objectionable, as the jury might have understood it as assuming the facts recapitulated in it.¹⁰

§ 473. Where an instruction ran thus, — "If the jury believe, from the evidence, that the writing obligatory in the second count of the plaintiff's declaration mentioned was held by the plaintiff at the time the letter was written by the defendant, requesting the plaintiff to credit the amount of a board bill owing from the plaintiff to him on any of the claims the plaintiff held against him," &c., — it was held erroneous in assuming that the letters were written by the defendant to the plaintiff, and that they related to the matters in controversy, of which the only evidence was the contents of the letters themselves, which, on their face, were addressed to no one, although no suspicion attached to the plaintiff's possession of them, and which, in their subject-matter, did not explicitly and necessarily relate to the disputed matters; and that the request to credit the board upon some of the claims was equivalent to the request to enter it upon any one of them, taking away the question concerning the appropriation, whether by plaintiff or defendant, from the consideration of the jury.¹¹

§ 474. And so, in an action of trespass, an instruc-

¹⁰ *Conaway v. Shelton*, 3 Ind. 335.

¹¹ *Armistead v. Brooke*, 18 Ark. 525.

tion was held erroneous, that the plaintiff was "entitled to recover all damages proved to have been sustained by him on account of the trespasses committed by the defendant on the plaintiff's premises, as alleged in the declaration," because it assumed that the defendant committed the trespasses, and that the only question before the jury was the amount of damages.¹²

§ 475. And an instruction requested in a suit on a railroad subscription, that "unless the jury shall find that the subscription to recover which this suit was brought was an individual undertaking of one of the partners," &c., was held erroneous in assuming the fact of the subscription, instead of leaving it to the jury.¹³

§ 476. Where a dower in a dwelling-house was set out thus,—"The west room, and bed-room adjoining, on the lower floor, the north-east chamber on the second floor, and one third part of the garret in the main building; privilege in the attic of the L part; privilege in the cellar, and in the yard and sheds; privilege to pass and repass to the above rooms and the well, as is most convenient,"—it was held, in regard to it, that the privilege of passing and repassing included a right of passing to and from the public street; that the expression, "as is most convenient," meant the convenience of the tenant in dower; and that if the way to the street through a certain front door was the one commonly used by her, and the most convenient, and she was prevented from using it by the wrongful act of the owner in reversion, then if she

¹² *Small v. Brainard*, 44 Ill. 355.

¹³ *Maltby v. R. R.* 16 Md. 422.

attempted to go out through another door, which was the next most convenient, the owner in reversion had no right to prevent her. The defendant owner in reversion requested a charge that if the plaintiff was confined to one route to and from the street, as she had refused to designate or agree on that route, he had a right to select it for her; and as he had selected a passage-way from the west door to the street, that was her only lawful way. This was held erroneous, as assuming facts to be found by the jury.¹⁴

§ 477. An instruction assuming the existence of a contract in dispute, is, of course, erroneous on the same principle.¹⁵ And more especially, a court can never be asked to charge on the assumption of a fact not only not conceded, but which the testimony strongly tends to disprove.¹⁶ And so, where the assumption is, that there is no dispute of a certain fact, it is erroneous, but it is held the duty of the counsel interested to call the attention of the court to the inadvertency at the time.¹⁷ And so, an indirect assumption, by throwing the weight of a case upon a part of the evidence, instead of all the facts therein, is condemned on the same general principle.¹⁸

¹⁴ *Miles v. Douglas*, 34 Conn. 393.

¹⁶ *Trask v. Payne*, 43 Barb. 576.

¹⁵ *Chichester v. Whiteleather*, 51 Ill. 259.

¹⁷ *Hoffman v. Ins. Co.* 1 Robertson (N. Y.) 521.

¹⁸ *Roots v. Tyner*, 10 Ind. 61.

CHAPTER XI.

HYPOTHETICAL INSTRUCTIONS.

§ 478. THERE are two kinds of hypothetical instruction — one allowable, the other vicious; the one founded on the facts in the case, the other wholly supposititious. It is not only proper, but often eminently judicious, to adopt the hypothetical mode of presenting a case, as to the bearing of the law thereon, since the jury thereby may be greatly aided in making the application of the law to the facts in evidence. And hence, in preparing instructions, each party may assume any reasonable hypothesis in relation to the facts, and ask the court to declare the law, as applicable to it; and it is error to refuse merely because the case supposed does not include some other hypothesis equally rational.¹ And where a party desires to obtain instructions on a particular hypothesis, he must state the facts hypothetically; and where that is not done, the refusal to charge as requested is not error.² But the hypothetical statement must be constructed of the actual facts in the case.³

§ 479. But the degree of evidence by which the facts are sustained or otherwise does not come into consideration. And the Supreme Court of Ohio remark, "It is doubtless true that the judge should not

¹ *People v. Taylor*, 36 Cal. 267.

³ *Gurney v. Smithson*, 7 Bosw.

² *R. R. v. McTighe*, 46 Pa. 402; *State v. Murph*, Minst. St. 321; *R. R. v. Hagan*, 47 (N. C.) 136.
Pa. St. 247.

charge the jury upon a hypothetical case, entirely without the testimony, because such a course is calculated to mislead the jury, and induce them to suppose that such a state of facts, in the opinion of the court, was possible, under the evidence, and might be considered by them. But where there is any evidence tending to prove the fact which the charge assumes, the court may properly make it the subject of comment.”⁴

§ 480. The object to be kept in view steadily is, to state the law upon a supposed state of facts, to be found by the jury, in such a manner as not to assume the facts, as determined; that is, to state the law hypothetically arising out of the given state of facts. That is, if the fact is so, the law is so; leaving to the jury the finding of the facts.⁵ Thus, where an indictment charged the playing of a banking game called keno, on appeal, the court said, “Whether the game of keno is a banking game or not, is a mixed question of law and fact. The judge has the right to assume, in his instructions to the jury, a hypothetical state of facts, and say to the jury, if they believe such a state of facts to be proved, that it amounts to a banking game. But the jury are the sole judges of the fact, and, under the instruction of the court, they have the right to say whether the game played is a violation of the statute or not.”⁶

§ 481. Where a hypothetical instruction was to the effect that upon a given state of facts, without deter-

⁴ Breese *v.* State, 12 Ohio St. 286; Hopkinson *v.* People, 18 Ill. 266.

⁵ Sherman *v.* Dutch, 16 Ill. ⁶ State *v.* Lenares, 12 La. An. 226.

mining change of venue or time, the prisoner would be guilty, as charged, it was held fatally erroneous, although closely pursuing the language of the penal statute, under which the prosecution was brought.⁷

§ 482. And so care must always be taken lest a hypothesis, correct at the beginning, should slide into an assumption of fact, or into an inference or conclusion which ought to be left to the jury. Thus, in a certain case, the Supreme Court of Georgia found occasion to remark, "A careful analysis of the charge under review makes it apparent that the judge put his reference to some of the facts hypothetically, as 'if the defendant told the plaintiff,' &c.; 'if Harris was not good at that time,' &c.; while his reference to other facts was in terms which assume that they were incontestably proven; as 'Jackson, who was ignorant of the condition of Harris at the time, and whose condition was known to Buttram,' &c. The hypothetical is the proper form of putting facts in such cases, because it distinctly puts the jury on the inquiry as to those facts; but in relation to other facts put positively before them, put as facts ascertained, in the same connection, in the same sentence, they are much less apt to feel the necessity of inquiry. Indeed, these different modes of treating different facts would seem to give a double assurance that they are relieved from the necessity of scrutinizing the evidence for the proof of some of them: (1) Because the judge has treated them as proven; (2) Because he has cautiously treated others as doubtful."⁸

⁷ Farrall v. State, 32 Ala. 559.

⁸ Buttram v. Jackson, 32 Ga. 413.

§ 483. In an action of trespass for illegally removing a pauper (the plaintiff), his family and effects, breaking and entering the plaintiff's house for that purpose, the following instructions were held rightly refused, being offered by plaintiff: (1) That if the defendants entered the plaintiff's house without authority of law, and by permission of plaintiff, he permitting them to enter, as an act of hospitality, and if they, being thus in, removed his children or goods, or did any illegal act against the will of the plaintiff, or against his consent, it would render them trespassers. (2) That if they, by color of law, or claiming to have authority as overseers of Madison, when they had not such authority, entered under such pretence by consent of the plaintiff, he being led by them to suppose they were so authorized, and removed his family or goods, or did any other illegal act against plaintiff's consent, they would be liable. These were held aside from the issue, and purely hypothetical, because the question was not whether the defendants became trespassers by acts committed after they had entered by permission, but whether, by such illegal acts, they became trespassers *quare clausum*.⁹ But I doubt whether the principle of this case would be generally adopted, since a trespass committed after a peaceful entrance, but which entrance was in pursuance of the design of the subsequent act, will make the actor a trespasser *ab initio*, and hence support an issue of trespass *quare clausum*. The second instruction would, however, be erroneous in leaving a question of law to the jury, by the words "other illegal acts."

⁹ Hunnewell v. Hobart, 42 Me. 566.

§ 484. In an action against a common carrier for negligence, the following instructions, in a hypothetical form, were held improperly refused: “(1) Although the jury may believe, from the evidence, that it was usual for steamboats running at night to carry torch-lights, and that they do not, under these circumstances, usually cover the cotton with tarpaulin or anything else, yet if they also believe that the cotton was exposed to the sparks from the torch-lights, and that the fire in this case did originate in that source, this is *prima facie* such negligence as will make the defendants liable, although the bill of lading excepts the dangers of fire. (2) That if the jury should believe that the cotton on the forecastle of the steamboat was torn and ragged, and was uncovered, and exposed to the sparks from the torch-lights, and that the fire originated in said cotton from the torch-lights, and was communicated to plaintiff’s cotton — this is such negligence as will render the defendants liable in this suit, although the jury should believe that it was usual for steamboats to carry torch-lights, and notwithstanding the dangers of fire are excepted in the bill of lading.” The court, on appeal, remarked, “This charge suggests the question whether or not the holding of a torch by a carrier in such manner as to expose, uncovered, ragged cotton to the sparks from it, and thus to ignite it, is negligence. Does this conduct involve the omission of that caution and care which a prudent man would exercise about his own business? This is the test of negligence, and when this test is applied, the conclusion is inevitable that the act was clearly one of negligence. No pru-

dent man, in taking care of his own ragged and uncovered cotton, would hold a torch in such a manner that sparks would fall upon it. The facts presented in the charge admitted of no other inference than that which the court was asked to draw, and it was therefore the duty of the court to give it.”¹⁰

§ 485. In relation to a boundary line, a court charged on a negative hypothesis, and the charge was excepted to for not taking for granted a fact well established. The instruction was, “If the evidence before you does not show that the boundary line between the lands of plaintiff and defendant was originally run and marked by the surveyor, or if the evidence shows you that that line, if run and marked, cannot now be ascertained, it will be your duty to find for the plaintiff.” The verdict for the plaintiff would be, that the straight line was the true one. The exception was overruled in the appellate court, which remarked, “The evidence showed very few landmarks establishing the straight line, perhaps on account of the prairie and the farm through which it passed, and the other line was so crooked, and there was so much said about paths through the bottom, that it was not rendered certain that this was a line run in making the survey. Under these circumstances, the court ought not to have charged the jury that the line was run [as contended by appellant], and there is nothing in the charge to indicate his opinion in the least degree that the fact of the running of the line was a doubtful, or leading, matter of inquiry.”¹¹

§ 486. Great care is requisite to base a hypothesis

¹⁰ *Hibler v. McCartney*, 31 Ala. 508.

¹¹ *Thomas v. Ingram*, 20 Tex. 728.

fully on the evidence. As, for example, in a case of murder the judge charged, "If the prisoner went to the house of Hodges, having a deadly weapon, for the purpose of taking the life of the deceased if he should find him there, or of provoking him into a fight, and did so, then it would be a case of murder, although they should believe the deceased made the first assault;" and it was held wholly irrelevant, there being no proof that the deceased made the first assault.¹² And where it misstates the issue, an instruction is erroneous, though hypothetical; as, whether a certain transaction was a conditional sale or a pledge, when there was no question between a conditional sale and a pledge,¹³ provided it is not apparent that it could not have misled the jury.¹⁴

Where an instruction was, that if the jury believed, from the evidence in the case, that an injury resulted from wilful and reckless negligence of a railroad company, then they were not confined to the actual damages sustained by the plaintiff, but might give such exemplary damages as the circumstances of the case warranted, and there was no evidence of wantonness, recklessness, or gross negligence on the part of those conducting the railroad train which caused the injury, it was held misleading.¹⁵ And so instructions based on a hypothetical case, when there is no evidence tending to make the case supposed, are simply out of place, and ought never to be given. They can only mislead the jury.¹⁶

¹² *State v. Harrison*, 5 Jones (N. C.) 121.

¹³ *Smith v. Sasser*, *ibid.* 390.

¹⁴ *Ward v. Henry*, 19 Wis. 80.

¹⁵ *Kennedy v. R. R.* 36 Mo. 364.

¹⁶ *Swank v. Adm'r*, 24 Ind.

201.

CHAPTER XII.

SPECIFIC RELATIONS TO THE EVIDENCE.

HEREIN we will chiefly confine our attention to civil causes mainly, reserving peculiar matters pertaining to criminal trials for a future chapter. And the subject now before us is, instructions which have, as their objective application, evidence and its incidents.

§ 487. A court may charge as to the burden of proof without invading the province of the jury, as, for example, the law arising upon the fact that a vendor remains in possession of property after the sale thereof, is the *prima facie* presumption that the sale was fraudulent. And this presumption, though not conclusive, changes the burden of proof, and requires explanation to remove it, and so to charge is correct.¹

§ 488. But an instruction virtually deciding a fact for the jury is erroneous, as where the court, on a question of fraud in fact, which is for the determination of a jury, drew the conclusion of fraud in obtaining a judgment from the evidence so as to virtually decide it.² And it is a ground for a new trial so to charge.³ As a matter of course, instructions are always to be construed with reference to the evidence,⁴ and it is no less requisite when the evidence itself is the specific object thereof. And also with

¹ Gibson v. Hill, 21 Tex.

³ Case v. Williams, 2 Cold. 239.

² Drinkard v. Ingram, 21 Tex.
650.

⁴ Hooksett v. Company, 44
N. H. 106.

reference to the issue on which evidence is presented. And where, under a plea of total failure of the consideration of a note, a defendant may establish its partial failure, yet if he has introduced no evidence from which such partial failure could have been found by the jury, he cannot complain of a charge that the jury should find for the plaintiff, unless a total failure of consideration had been established; for no party has a right to require more than that the court shall announce the law with reference to such issue as it is practicable for the jury to find a verdict on, considering the evidence adduced in the cause.⁵ But it is error to charge a jury to exclude from consideration all facts not distinctly averred in the petition, since it is no part of their duty to decide what facts are so averred.⁶

§ 489. Where an instruction given is decisive of the suit, and excludes from the consideration of the jury the questions raised by the evidence of the opposing party, it is erroneous,⁷ being evidently an indirect decision of a want of credibility in such opposing evidence. And so one which in an action for work and labor excludes all consideration of the proof of a special contract.⁸

§ 490. It is held to be a fatal error to instruct a jury that a party introducing a witness thereby indorses the credibility of such witness. It is sufficient to say that a party cannot impeach his own witness.⁹

⁵ *Willis v. Bullitt*, 22 Tex. 330.

⁸ *Lee v. Quirk*, 20 Ill. 395.

⁶ *Oliver v. Chapman*, 15 Tex.

401.

⁹ *Jarnigan v. Fleming*, 43

Miss. 711.

⁷ *Clarke v. Hammall*, 27 Mo.

55.

§ 491. In an after instruction in a case that had been twice tried before, wherein on the third trial the jury returned, and said they could not find from the evidence the amount of sales of the partnership stock sold by the defendant, nor the number and value thereof in defendant's possession at the commencement of the suit, and the judge then instructed them orally that they had knowledge as individuals of the value and increase of such stock, and could take into consideration that knowledge in judging of the evidence in finding their verdict—this was held not a sufficient ground for reversal.¹⁰ But evidently the instruction could not be justified under any general rule, but the appellate court appear to have regarded it as proper in order to make a disposition of the case on the third trial.

§ 492. It is held in Indiana not advisable for a jury to carry depositions or other written evidence with them to their room. And so, where a jury had retired and returned into court, requesting to hear a portion of a deposition, it was improper for the court to ask them if they desired "any of the account books," and to offer to send such books to their room.¹¹

§ 493. It seems that sometimes objections to a deposition may properly be referred to a jury, as where a defendant's counsel objected that the depositions were guarded and avoided details, which indicated a contrived plan to get the notes into the hands of a third party for collection, and the court charged the jury that if they found the depositions subject to this

¹⁰ Carroll v. Evans, 27 Tex.
267.

¹¹ Eden v. Lingenfetter, 39
Ind. 19.

objection, it was a matter they might take into consideration in weighing the testimony therein, and that the whole question as to the truth of the depositions was for them, it was held properly submitted.¹²

§ 494. But the reference of written instruments in evidence to be construed by the jury is erroneous, as it is a question of law for the court; as where an instruction was to the effect that a certain entry was a sufficient memorandum in writing of a contract to bind the defendant, provided that the jury should find it "either expressly or according to the sense and signification of its language and figures under the established usage and custom of merchants in the city of Baltimore at the time, &c., represented truly and fully the terms of and parties to the contract of sale," it was held error in that it referred to the jury the construction of the entry or memorandum.¹³ And so a charge which refers to the jury the construction of any provision in a mortgage, the validity of which is controverted before them, is erroneous.¹⁴

§ 495. In some states the court may state the testimony directly, and charge the law thereon, but not in others. It is mainly a statutory regulation.¹⁵

§ 496. But the force and effect of testimony may sometimes be charged, as if the testimony of a certain witness is believed it will establish a specified fact, leaving the jury to believe or disbelieve the witness.¹⁶ But care must be taken to state correctly the

¹² *Clough v. Patrick*, 37 Vt. 421.

¹³ *Williams v. Woods*, 16 Md. 220.

¹⁴ *Price v. Mazange*, 31 Ala. 701.

¹⁵ *Case v. Williams*, 2 Cold. (Tenn.) 239; *Ayres v. Moulton*, 5 Cold. 156. Contra, *R. R. v. Kendrick*, 40 Miss. 389.

¹⁶ *Russell v. Ely*, 2 Black (U. S.) 576.

force and effect of evidence,¹⁷ and that the statement does not exclude a material fact,¹⁸ submitting the effect distinctly to their consideration and judgment.¹⁹

§ 497. Where a defendant introduced the testimony of an expert to prove handwriting, the jury were instructed in substance that the law permitted men who had opportunity by education and practice for acquiring peculiar skill in judging of handwriting to testify their opinion as to the genuineness or identity of specimens submitted to their inspection — such opinion was evidence to be considered by the jury in connection with the other evidence bearing on the subject, but was not of itself conclusive; that the rule of law permitting them to testify their opinion was grounded on the fact that generally such opinion was correct; that the value of such opinion was to be determined by the jury, having reference to the skill and competency which the witness manifested, in connection with the other evidence which was before them to be considered in determining whether the disputed letters were in the plaintiff's handwriting; that experts were not infallible; generally their opinions were reliable, but sometimes they were wrong; that the court had in many instances known them to hit right, and in some instances wrong. On exception the instruction was sustained.²⁰

§ 498. As to a restriction of the right of the court to comment on the evidence, it is statutory in part. But wherever there is no statute prohibiting it, I sup-

¹⁷ *Connelly v. Walker*, 45 Pa. St. 453.

¹⁹ *Eddy v. Gray*, 4 Allen, 438.

²⁰ *Pratt v. Rawson*, 40 Vt.

¹⁸ *R. R. v. Porter*, 19 Md. 468. 188.

pose the right exists. But it must never be carried so far as to virtually decide the case, or any of the material facts therein. And to guard this is the object of prohibitory statutes. The Supreme Court of California in a certain case manifested a decided repugnance to the restraint. "The court," the opinion goes on to say, "could not, under the constitution of this state, which prohibits judges from charging in respect to facts, decline without error to present, for the consideration of the jury, the law applicable to that theory, should they find it the true theory of the case. If mischief results from such a course, it is not due to the court, but to the inflexible rule by which the court is governed. At common law judges are not thus fettered, but are allowed to charge in respect to facts, and express their opinion as to the weight of evidence. They may, therefore, direct the attention of the jury to the facts and circumstances which they deem to be of controlling weight, and warn them against false lights. Which is the wiser rule is not for us to say; but it admits of serious doubt whether the cause of justice has been promoted by the adoption of the rule by which the courts of this state are governed. There could have been no object for the charge except to afford to life and liberty further protection against judicial dishonesty and tyranny. Such a movement would have found fitting occasion when Henry VIII. divorced [and murdered] his wives, and kindled the fires of the *auto da fe*; or when Jeffreys advised and judicially enforced the despotic and sanguinary measures of James II.; but in this day and place, the ermine is not the gift of

tyrants, but of the people, whose will is subserved by an honest, not corrupt, exercise of its functions; and to deprive the jury of the aid and experience of the judge in sifting and weighing the testimony may be of doubtful wisdom.”²¹

In Maine, it is held that comments upon the testimony in the charge by the judge furnish no ground of exception, and will not be considered as depriving one, even in a criminal case, of an impartial trial, when the jury are so instructed that they must necessarily understand that they are the judges of the facts proved, and responsible for the inferences drawn therefrom, and when, accordingly, a fair construction of the charge does not authorize an inference that the jury were instructed imperatively and as matter of law on the force, effect, and weight of the evidence, what the proof was, or that certain facts were in evidence; but the judge, directing attention to certain suggestions developed by the testimony, left those matters to their consideration.²²

In Indiana, it is held that justice is often promoted by judicious comments. But “the court is not bound to remark on the evidence, and whenever it is done it should be with great care and caution, and the jury always be distinctly told that such observations are submitted to aid them in making inferences from the evidence, and not to control them; that, after all, they are exclusively responsible for the facts which they shall find. The law of the case the court must give to the jury when asked, and the jury must act upon it,

²¹ *People v. Taylor*, 36 Cal. 266.

²² *State v. Reed*, 62 Me. 129.

when given, without question, in a civil case. It is a grave question of policy whether the presiding judge should discuss the evidence at all in his charge to the jury. It was the practice of the English judges to do so, and in this state it has not been prohibited; and so long as the *nisi prius* bench shall be occupied by gentlemen of integrity and learning, guided in the discharge of their duties by a love of impartial justice, it is not at all probable that the legislature will interfere to limit this authority derived from the common law. Some of our states have by legislation restricted the judge to giving merely the law of the case to the jury, but it is not very evident that the certain administration of justice has been aided thereby.”²³

In New Jersey, a judge has an undoubted right to make such comments as he thinks necessary or proper for the direction of the jury. He may intimate an opinion as to the weight of evidence, or call the attention of the jury to any matter in the cause affecting the credibility of a witness, all this being a matter of judicial discretion not subject to review in error.²⁴

In Minnesota, the judge is held not authorized under the statute to express any opinion upon the facts so as to influence the jury in their decision; and when, on the question of the delivery of personal property, the judge stated in his charge that he “saw nothing in the case that went to show that the delivery to the plaintiff was not valid under the circumstances,” it was held error, and that the error was not cured by the qualification of the remark that he only spoke “so

²³ Shank v. State, ex rel. 25 Ind. 208.

²⁴ Bruch v. Carter, 32 N. J. 554.

far as it was in the province of the court to determine the question.”²⁵

In Iowa, held that a charge must be strictly confined to matters of law, and the court must not comment on the evidence, and instruct what facts are and what are not proved.²⁶ And, indeed, in all the states this would doubtless be considered as going too far. Where comments are allowed, they should be mainly hypothetical, and must not take the questions from the jury.

§ 499. It is the province of the court to judge of the admissibility of evidence, but when admitted it is the province of the jury to judge of its materiality. And so where the jury were instructed that it was immaterial whether a carriage was purchased before the notes were given, &c., it was held error as an invasion of the province of the jury.²⁷ And the credibility of testimony is also for them exclusively.²⁸ And so where the testimony of a plaintiff and of a defendant were directly in conflict, and the former was corroborated by another witness, it was held error to instruct the jury that if they believed that the testimony of the first two witnesses was entitled to equal credit, the testimony of the third created a preponderance of testimony in favor of the plaintiff, unless there was some fact or evidence tending to corroborate the defendant, and that a judgment for the plaintiff would be reversed for such an error, although the court also

²⁵ *Caldwell v. Kennison*, 4 Min. 47.

²⁶ *Russ v. Steamboat*, 9 Iowa, 374.

²⁷ *Stacy v. Cobbs*, 36 Ill. 351.

²⁸ *Commonw. v. Barry*, 9 Allen, 278.

charged the jury that they were generally the exclusive judges of the credibility of witnesses.²⁹

§ 500. However, a judge may charge a jury as to a rule of estimating credibility; as where a witness, testifying to material facts, as to which deliberate false swearing would be perjury, is contradicted by other witnesses, the court may charge that if they believe the witness has knowingly sworn falsely in reference to any fact, he is not entitled to be believed in reference to any other fact testified to by him.³⁰ And where the judge called the attention of the jury to the sworn contradiction of herself by a principal witness, and said that it was a strong circumstance tending to discredit her testimony on the last trial, but that the amount of credit due to that testimony was a question for them to determine, it was held not error.³¹

But a charge that if the jury believe the testimony of witness, they must find for the plaintiff, but if they believe the testimony of another, they must find for the defendant, is error, because it assumes that there is an irreconcilable conflict in the testimony of the two witnesses, and so is an invasion of the province of the jury.³² And so where several witnesses are contradictory, the judge may properly refuse to charge what the verdict should be, should they believe the truth of the testimony of a particular witness.³³

²⁹ *Ely v. Tesch*, 17 Wis. 202.

³² *Cain v. Penix*, 29 Ala.

³⁰ *Roth v. Wells*, 29 N. Y. 374.

471.

³³ *Bailey v. Bailey*, 97 Mass.

³¹ *Dunn v. People*, 29 N. Y. 373.

523.

And still more is it error, under conflicting testimony, to take the point from the jury, and decide it for them.³⁴

§ 501. The weight of evidence is also for the jury, and the court is not at liberty to inform the jury which evidence is the stronger in a conflict. The value of all testimony is to be ascertained by the jury in weighing it and finding which way it preponderates.³⁵ In a trial of title, the following instruction was held erroneous, as a charge on the weight of evidence: "In order to enable the defendant to recover, he must show that the plaintiff had a legal or equitable right to the land ten years before the suit was brought. This is not shown by the mere production of the field-notes, without the certificate and proof of its genuineness. Having failed to do this, you will inquire whether Kimbro has had the land ten years since the issuance of the patent. You will find for the plaintiff."³⁶

§ 502. The sufficiency of evidence is for the jury, accordingly, where there is a contrariety.³⁷ Thus, it was adjudged error in a case where there was a complicated account, among the items of which was a large quantity of corn, and evidence tending to establish the correctness of this item, for the judge to charge the jury to disregard all items in the defendant's account, "except for commissions, sacks, meat, twine, labor on boats, and ice," — since it was the

³⁴ Brooks v. R. R. 15 Mich. 332.

³⁵ Rockwood v. Poundstone, 38 Ill. 199.

³⁶ Kimbro v. Hamilton, 28 Tex. 566.

³⁷ McNeill v. Arnold, 22 Ark. 477.

province of the jury, and not of the court, to determine what charges were proved.”³⁸

And the following instruction, given for the plaintiff, was held erroneous, in excluding evidence of a new agreement for an extension between landlord and tenant, and therefore evidence whether the old lease was surrendered, and a new tenancy created. “The jury will disregard all the evidence offered in this cause tending to show a discharge of the covenants to pay rent reserved in the lease offered in this cause, as it would be improper for them to consider any proof for that purpose, unless such proof is in writing, and under the seal of the party.”³⁹ And where a court charged thus, “Nor is there any ground or reason for a recovery against him, under the law and evidence in this case,” it was held error, because the jury should be left free to decide upon the evidence submitted.⁴⁰ And again, where the charge was, “that the only question for them to consider was whether or not the defendant made the contract sued on, and that if she did make such contract as testified to, the plaintiff was entitled to recover the amount agreed upon in said contract,”⁴¹ it was held erroneous, because it excluded the question of payment for services embraced in the evidence. And so, where the ruling of the court virtually excluded evidence, in regard to the statute of limitations, by restricting an adverse claim to the date of a patent.⁴²

³⁸ *Myers v. Walker*, 31 Ill. 363.

³⁹ *White v. Walker*, 31 Ill. 432.

⁴⁰ *King v. King*, 37 Ga. 205.

⁴¹ *Lamar v. Glawson*, 38 Ga. 254.

⁴² *Kimbrow v. Hamilton*, 28 Tex. 568.

§ 503. The Supreme Court of Alabama has laid down the general rule, as to charges concerning evidence, drawn from a long list of precedents in that state, thus:—

1. A general charge on the effect of evidence cannot be given where there is any conflict in the evidence as to any material point involved in the determination of the cause.

2. Such a charge is erroneous where any fact necessary to the decision of the cause has to be inferred from the evidence, and which is not a legal presumption from it.

3. When the plaintiff alone introduces testimony, such a charge is equivalent to a demurrer to the evidence; or such a charge in favor of the plaintiff, on the evidence of the defendant, has the same effect as a demurrer thereto would have.

4. Where both parties introduce evidence, such a charge may be given, if there is no conflict in the evidence on any material point, and there is no fact to be inferred by the jury from the evidence, material to the decision of the cause, one way or the other.

5. Where both parties introduce evidence, and there is no conflict therein as to a material point, and the facts to be inferred are legal presumptions, the court may give a general affirmative charge; but in all cases it must be predicated upon a belief of the evidence by the jury.

6. Where both parties introduce testimony, and it only tends to prove the claim of the plaintiff, or the defence of the defendant, it is erroneous to give a general affirmative charge on the effect of the evidence.

7. The courts should be careful not to invade the province of the jury. And the court thereon remarks, "The application of these rules occasionally becomes, in practice, a matter requiring nice discrimination; and, in cases of difficulty or doubt, the proper course would be to leave it to the jury to decide, under appropriate instructions from the court, so as to secure the parties the right of trial by jury; and should the jury make any clear mistake in their verdict, it could be set aside upon an application for a new trial."⁴³

§ 504. Where a jury were instructed that they might find a verdict, on a recital in a deed of an agreement in writing, on which there was no proof of loss, or of the actual existence of the agreement, other than the recital, it was held error, because the "court passed all these requirements [of the statute of frauds] at a bound, and gave the jury unrestrained license to find for the plaintiff, on the admission or recital in the deed that an article of agreement had existed, without further inquiry into its loss or contents."⁴⁴

§ 505. It is not essential that there should be direct testimony upon a point, in order to afford a proper basis for an instruction; it is sufficient if there are circumstances from which the fact involved may be inferred.⁴⁵

§ 506. In Texas the rule is laid down, that "when the facts of a case require a knowledge on the part

⁴³ *Morris v. Hall*, 41 Ala. 534.

⁴⁵ *Tyler v. Tel. Co.* 60 Ill.

⁴⁴ *Allen v. Allen*, 45 Pa. St. 423.

of the jury of the different classes or kinds of evidence, it is the duty of the court to charge them in general terms as to the distinguishing characteristics of those different kinds, and the credit which under ordinary circumstances may be placed on evidence of either class; but under our [the Texas] statute, the court will not, as a general rule, be authorized to refer the jury to any particular evidence before them, and characterize it as the highest or other degree of evidence " ⁴⁶

CHAPTER XIII.

INSTRUCTIONS RELATING TO DAMAGES.

§ 507. THERE are two classes of damages — compensatory and exemplary. In cases of trespass or torts, accompanied by oppression, fraud, malice, or negligence, so gross as to raise a presumption of malice, the jury have a discretion to award exemplary or vindictive damages. But in all other cases of civil injury or breach of contract, the object is to give compensation to the party injured for the actual loss sustained. The amount of compensatory damages is held to be a question of law not governed by any arbitrary assessment, nor left to the fluctuating discretion of either judge or jury. Compensation, in its legal signification, consists in remuneration for loss of time, necessary expenditures, and for permanent disability, if such be the result.¹

⁴⁶ Walker v. State, 37 Tex. 366.

¹ Parker v. Jenkins, 3 Bush. (Ky.) 587.

It is not error to instruct the jury that they not only *may*, but *ought* to, give exemplary damages if they find the facts which are held to justify such damages.²

§ 508. Where the jury are instructed as to exemplary damages, it is held, in Illinois, the presumption is that it influenced their verdict even when the damages do not seem to be excessive, considered merely as compensatory, and the error will reverse the judgment on appeal. So in a case against a railroad, where the instruction was, that "the amount of damages to be recovered for personal injuries rests much in the discretion of the jury; and they have a right not only to compensate the plaintiff for all moneys by him paid out, and for personal injuries, but to punish the defendant according to the circumstances of the case, if the defendant has been guilty of wilful misconduct in perpetrating the injury," and there was no proof of wilful misconduct,—the appellee claimed that the jury had not awarded vindictive damages, so that there was no injury done thereby to appellant. But the court said, "We have no means of knowing whether they did or not [award vindictive damages]. The attention of the jury was directed to that fact as an element of increased damages, and we may presume that the instruction coming from the court had its due influence, and made its impression on the minds of the jury against the appellant."³

But, in Texas, the rule is held to be the other way;⁴ and this I would think to be more in conformity with

² *Hooker v. Newton*, 24 Wis. 292.

⁴ *Fitzpatrick v. Blocker*, 23 Tex. 552.

³ *R. R. v. Manly*, 58 Ill. 304.

the general principle that a harmless instruction, though erroneous, will not reverse when it was evidently without effect, leaving the verdict what it would have been without it. (But see § 510, *infra*, for confirmation of the Illinois decision.)

§ 509. Where a court, in charging the jury that they might give exemplary damages in trespass, if they found it attended by circumstances of aggravation, remarked, playfully, in illustration, "Such damages as would teach the old gentleman not to violate the Sabbath, nor injure his health by riding in the night, nor interfere with the rights of others," it was held error because the remarks were calculated to make the jury believe that the facts justified heavy exemplary damages.⁵

§ 510. It is held in Wisconsin, that for injuries inflicted by a domestic animal permitted to run at large, and alleged to have been known by defendant to be vicious and disposed to injure mankind, exemplary damages are allowed only on proof of gross and criminal negligence, evincing a wanton disregard of the safety of others, and in law equivalent to malice. And where the evidence will admit of doubt as to the existence of such negligence, it is error to instruct the jury, without qualification, that they may find exemplary damages; that this is one of those cases in which such damages are allowed. And a judgment for the plaintiff will be reversed and a new trial granted for such error, although the damages found by the jury do not appear to the appellate court excessive.⁶ (See § 508, *supra*.)

⁵ *Hair v. Little*, 28 Ala. 237. ⁶ *Pickett v. Crook*, 20 Wis. 358.

§ 511. It is held no error for a judge to state the rule of damages in cases having some resemblance to that before him, in order to suggest that they do not apply to that case at bar.⁷

§ 512. Where A sold B a lot of washed wool, at forty-six cents per pound, to be delivered in about nine or ten days after paid for, suit was brought by the seller, alleging a readiness to deliver, and a failure on the part of the buyer to pay for it, whereon he had, after notice to the buyer, sold it at auction for twenty-five cents per pound; to which allegations the buyer made answer, that there was some unwashed wool in the lot offered under the agreement, which he refused to receive and pay for, and the seller refused to throw out. On the trial this instruction was given: "In this sale the plaintiffs were bound to act in good faith as the agents of the defendants, and it is a question of fact for the jury to determine from the evidence, whether they, the plaintiffs, sold this wool in good faith, and if so, what it brought at that sale. If this wool was not sold in good faith, but it was a mere sham sale, the plaintiffs cannot succeed in this suit in recovering damages from the defendants for not receiving and paying for the wool." This was held erroneous, because in effect it told the jury that if they found the auction sale a sham, they could not at all find for the plaintiffs, whereas it ought merely to have been shaped so as to direct them to the bearing of that fact upon the measure of damages.⁸

§ 513. Where there is a remote cause of injury, and

⁷ Hackett v. R. R. 42 N. H.
390

⁸ Barbee v. Laws, 15 Ind.
112.

where the evidence is conflicting, the court may properly decline to instruct that under the peculiar circumstances of the case, the cause of injury is too remote to render defendants liable, for in such a case, the peculiar circumstances of the cause are unsettled, and the court cannot ascertain them, but must refer them to a jury.⁹

Where damages are to be assessed for the appropriation of land under eminent domain, a witness as to value may be cross-examined, to find what he takes into consideration in making up his judgment. And in case it should appear thereon that he has assumed a false basis of computation of value, as that, in appraising the land left, he considered remote consequences of the appropriation, the court should instruct the jury that the estimate based upon such considerations is not to be regarded.¹⁰

§ 514. A court may, in Pennsylvania, properly express an opinion in an action for false imprisonment, that more than nominal damages should be given, where the question as to what amount shall be given is fully left to the jury.¹¹

§ 515. In case of slander, an instruction is correct which informs the jury that the law implies damages from the speaking of the words, and implies that the speaker intends the effect the words naturally tend to produce, and that the jury are to determine what damages ought to be given, if they find a verdict of guilty.¹²

⁹ *Holmes v. Watson*, 29 Pa. St. 457.

¹⁰ *Sater v. Plank Road Co.*
1 *Clarke* (Iowa) 394.

¹¹ *Oswald v. Kennedy*, 48 Pa. St. 9.

¹² *Baker v. Young*, 44 Ill. 43.

§ 516. It is held that the measure of damages in an action against a sheriff for the tortious seizure of a steamboat under execution, is the actual value of the boat as property, although it may be "unrivers-worthy" at the time of the sale, and also interest on the value of the property injured, although this latter item is in the discretion of the jury alone, and it is error for the court to instruct them to allow interest.¹³

§ 517. In an action on a guaranty, though it is error in terms to charge that if the jury find a verdict for the plaintiff, they must assess as damages the amount of the penalty fixed in the guaranty, yet, if the plaintiff's damages, if any, must exceed the penalty, the direction must be regarded as limiting the verdict, and the defendant is not injured by the instruction, and the judgment will not be reversed thereon.¹⁴

§ 518. In an action by the mate of a vessel against the owners to recover wages for services in navigating to the end of a voyage after the master's death, the jury may properly be instructed that he is entitled to recover what his services were worth to the owners, if his claim is only for the same wages that had been allowed to the master.¹⁵

§ 519. In a claim, consisting of debts and credits on the part of the plaintiffs, presented against an estate, and put in suit against the executor, the following instruction was held erroneous: "If the defendant has failed to prove any of the set-offs in his

¹³ *Crow v. State, use, &c.*,
23 Ark. 685.

¹⁵ *Smith v. Curtis*, 5 Allen,
367.

¹⁴ *Jones v. Post*, 6 Cal. 102.

answer, but resorts to the plaintiffs' claim to prove the credits he is entitled to, then the jury will take the whole of the plaintiffs' claim as true," since the evidence offered by the plaintiffs was very slight, and the jury would probably not have found the account proved except for the instruction.¹⁶

§ 520. It has been held in Georgia (1866), that the judge had no right to instruct the jury not to consider evidence of the value of Confederate currency at the time the contract was made, and restrict them to the value at the time the debt fell due.¹⁷

§ 521. A case of damages in locating a railroad, so as to destroy the value of an easement in a canal, arose in Massachusetts, in which the following is a portion of the syllabus of the reporter: "No exception lies on the part of the respondents to an instruction to the jury, in reference to the damages sustained by reason of the location of a railroad over a portion of a lot, and the filling up of an adjacent canal, in which the owner of the lot had a privilege, that if by reason of these acts the value of the land which remained was so increased in consequence of some peculiar advantages conferred upon it, in which the other estates in that vicinity not situated upon the canal did not participate, that the remainder of the land was worth as much as the entire lot was before, the owner has no claim for damages, although the jury are also instructed that the benefit which is to be set off is some increased value which the estate had received in consequence of its becoming better adapted to, and

¹⁶ *Johnson v. Kent*, 9 Ind. 254.

¹⁷ *Evans v. Walker*, 35 Ga. 117.

more valuable for, some specific purpose than the other estates where the land had not been taken, and illustrations of such benefits are given.

"If there is a controversy as to the value of an easement in a canal in a city, into which drains and sewers lead, a request for an instruction to the jury that in estimating such value, they should take into consideration all the lawful uses to which the canal has been subjected; and the effect of such uses, either in impairing the value of the canal for navigation, or as leading to its probable suppression as a nuisance, is sufficiently complied with by an instruction to them that they are to determine the value of the easement at that time, having reference to the state of things as they then existed, the sort of canal it was, its depth, width, character, degree of offensiveness, and all the facts and conditions affecting the quality and character of the easement, and the land with which it was connected."¹⁸

§ 522. Where one having a patent right interest in a planing machine, employed the plaintiffs to construct one for him, but, before finished, he sold his interest in the machine to another, and notified the plaintiffs in the presence of the buyer who assented to it, and, when finished, they delivered the machine to the buyer, and charged it to him, it was held that the buyer could only be held liable on an original promise in the matter; but that if he expressly or impliedly directed the plaintiffs to finish the machine, and the same was accordingly completed and deliv-

¹⁸ *Whitman v. R. R.* 7 Allen, 314.

ered to him, he was liable, and a subsequent taking back of the machine would not prevent a recovery where it appeared to have been taken back merely for the purpose of making a sale thereof on the buyer's account, without intending to discharge his liability.¹⁹

§ 523. As to set-off in damages, I quote the following syllabus of a New York case: "In an action to recover the rent of a store, where the defendants, who were the tenants, had set up as a counter-claim damage to their goods, during their occupation, by smoke and soot of a furnace erected by the plaintiff, his servants, or agents, in the basement of such premises, the exclusion of evidence offered to prove the items of such damage, and the nature and extent of the injury done to such goods, was held to be erroneous, the case having been sent back for a new trial on a former appeal, because of the exclusion of similar evidence. Held that the case was *res adjudicata* on that question.

"When a counter-claim is proved without contradiction, the court should direct the jury to assess the defendants' damages, if requested to do so, instead of leaving any discretion with them on the subject. And when the judge instructed the jury, that as to the question of the defendants' damages, the testimony fixed it beyond peradventure, and the jury, notwithstanding, rejected the counter-claim, and gave the plaintiff a verdict for the amount claimed, held that such verdict was not only against the evidence, but

¹⁹ *Sloan v. Van Wyck*, 36 Barb. 335.

directly against the charge of the judge, and the cause should be reversed.”²⁰

§ 524. It is of course proper to refuse an instruction charging that the plaintiffs are not entitled to damages on a ground on which they have not claimed damages.²¹

§ 525. Where a jury were instructed in regard to certain pass-books in evidence, that they “add up the pass-books to ascertain the amount,” this was held misleading, since the jury might have understood it as directing them that the books were of that character of evidence which would exclude all questions except the amount thus footed up.²²

§ 526. A charge in regard to costs may be correct; as, for example, where, in an action for assault and battery, the judge charged the jury as to the effect of their verdict on costs, in case they should find for plaintiffs, and refused to charge that, in arriving at the amount of the verdict they would give the plaintiff, they had nothing to do with the question of costs, or whether or not their verdict would entitle him to full costs.²³ Indeed, it is held in New York, that it is the common experience to apprise the jury of the effect of their verdict upon the parties in respect to the question of costs; and the practice has been expressly and repeatedly affirmed.²⁴

But, in Ohio, it is held error to instruct a jury, in

²⁰ *Ayres v. O'Farrell*, 4 Rob. 668.

²³ *Waffle v. Dillenback*, 39 Barb. 123.

²¹ *Weber v. Kingsland*, 8 Bosw. (N. Y.) 417.

²⁴ Same parties, 38 N. Y. 53.

²² *Hovey v. Thompson*, 37 Ill. 538.

an action against a railroad company for trespass to the persons, that in a proper case of exemplary damages they should know that in case the party recover less than one hundred dollars, he cannot recover his costs in the action.²⁵

In Alabama, where a charge was requested to the effect that the plaintiffs were not entitled to recover the whole of the costs in that action, which was strictly true, it was nevertheless held erroneous because of its tendency to confuse the jury by making it their duty to refuse an allowance to the plaintiffs of a part of the costs, without affording them any means of ascertaining what part of the costs should be allowed, and what not, and compelling them thus to determine the point by a mere guess in the dark, so that it was held not error to refuse it.²⁶

CHAPTER XIV.

DIRECTING VERDICTS.

§ 527. It is a general principle that where the evidence offered by plaintiff does not legally tend to support his claim, as set forth in the pleadings, the court may properly instruct the jury to return a verdict for the defendant; but, on the other hand, where the evidence does tend to support his allegations, although in a slight degree, the jury must be left to

²⁵ R. R. v. Bartram, 11 Ohio St. 457.

²⁶ Miller v. Garrett, 35 Ala. 101.

find the facts. A directing instruction may be in this form: "The plaintiff having failed to introduce any evidence to show any liability on the part of the defendant, and no connection of any kind upon the part of the railroad company with plaintiff having been shown in any way, and no evidence of any kind in the case having been offered to show any liability or connection between plaintiff and defendant, the jury are instructed to return a verdict in favor of the defendant."¹

But where there is any evidence tending to show a right of recovery, as above stated, a peremptory instruction to the jury to find for the defendant is fatal error,² because the question of the sufficiency, and of the credibility, is not for the court to decide.³ The test is laid down thus: If the plaintiff has a case, were it not for the defendant's testimony, a directing instruction is erroneous.⁴

§ 528. Where, in an action for damages, the non-responsibility of the defendant for the injuries complained of was established by uncontradicted evidence, and the court refused to instruct the jury to find as in case of a nonsuit, the refusal was held error,⁵ it being not merely the right, but the duty, of the court to inform the jury where there is no evidence.⁶ And even where the evidence is plainly insufficient, so that there need be no estimate of suffi-

¹ Singleton *v.* Pacific R. R. 41 Mo. 469.

² Stephens *v.* Brooks, 2 Bush. (Ky.) 137.

³ McKown *v.* Craig, 39 Mo. 156.

⁴ Hill *v.* Camfield, 56 Pa. St. 458.

⁵ Parker *v.* Jenkins, 3 Bush. (Ky.) 587.

⁶ Hynds *v.* Hays, 25 Ind. 31.

ciency; and even in a criminal case, where the jury determine the law and the facts.⁷

§ 529. Where there is a balance of testimony, as where, in an action on a promissory note, the defendant denied the execution on oath, and the plaintiff testified that he had taken the note to the defendant, who said it was all right, and he would pay it, the jury may be instructed hypothetically that if they find the evidence equally balanced, they should find for the defendant; and it is held that such an instruction is not open to the objection that it tends to mislead the jury into the belief that they are to find for the defendant if an equal number of witnesses have testified on each side, since an equal balance of evidence, they would know, does not refer to the number of witnesses, but to the equal weight and credit of testimony, whether written or verbal.⁸

§ 530. A plaintiff whose evidence fails may preserve his rights by taking a nonsuit,⁹ which leaves him free to bring a suit again under better preparation, while a verdict would create the bar of *res adjudicata*.

§ 531. There is a distinction between direct and circumstantial evidence, thus explained by the Supreme Court of North Carolina: Where evidence is direct, leaving nothing to inference, and, if believed, is the same thing as the fact sought to be proved, the judge is at liberty to instruct the jury that if they believe the witness they may find for the plaintiff or

⁷ State v. Danbert, 42 Mo. 242.

⁹ R. R. v. Moore, 37 Mo

⁸ Bridenthal v. Davidson, 61 341.

Ill. 460.

for the defendant. But this is not allowed where the evidence is circumstantial, or where the evidence offered on the other side tends to explain it, or to rebut the inferences sought to be drawn from it, or to contradict the witness.¹⁰

§ 532. At the close of a plaintiff's case, a defendant has the right to ask instructions on the evidence, and have the case submitted to the jury, where the evidence is insufficient in law, on directive instructions.¹¹

§ 533. It is error for the court, when the evidence is all in, to inform the jury that, in any event, the plaintiff is not entitled to recover, and if the issue were found for him the court would set aside the verdict; and then add, "The jury can take the issues and pass upon them, and say how the matter was." On this the Supreme Court remarked, "This manner of submitting the issues was calculated to throw the jury off their guard, and to prejudice the rights of the plaintiff. Why consider the evidence with that care and attention which properly belong to all jury trials, if their findings are to have no weight with the court, but are to be set aside in any event?"¹²

§ 534. Where it was necessary, under anti-liquor laws, to prove the knowledge of the law on the part of a firm residing in another state, and also the intent to enable the purchaser of liquors from them to violate the provisions of the law, and the jury were instructed that a second draft was for a contract made in another state, and that defendant was required to show

¹⁰ Gaither v. Ferebee, Win- Mo. 216; Smith v. R. R. 37 Mo.
ston (1) 310. 287.

¹¹ Clark's Adm'r v. R. R. 36 ¹² Dula v. Young, 70 N. C. 452.

that the sellers had knowledge of the law, and that there was no evidence on this point, and directed them to find for the plaintiff, it was held erroneous, in not setting forth also the necessity of proving the intent. But as this was an error to the prejudice of the plaintiff, the defendant could not be heard, to complain of the omission.¹³

§ 535. In an action against a railroad company for killing animals on the track, and it was proved that the engineer had failed to fulfil his obligations prescribed by the statute, and the court directed a verdict for the plaintiff, it was held erroneous, because there was no testimony that the accident complained of was occasioned by the engineer's omission of duty, and inferences of fact must be left to the jury, the court having no right to draw such conclusions, unless the case is within the operation of some legal presumption.¹⁴

§ 536. A proper test as to directing a verdict is held thus in Wisconsin: "It is always proper to withdraw a question from the consideration of a jury, where, in case of an adverse verdict to the view of the court, it would be proper to set the verdict aside as against the weight of evidence. Where the defendant, claiming to be the owner of a note made by the plaintiff to a third person, set up a counter-claim for the balance due thereon, his own evidence showed that, previous to the commencement of the action, an agreement was entered into between him and the holder of the note, that the latter should ascertain the amount of a

¹³ *Bank v. Curren*, 36 Iowa, 558.

¹⁴ *R. R. v. Bibb*, 37 Ala. 702.

payment made upon it, but never indorsed, and should indorse the same, and then transfer the note to the defendant, who was to execute his own note for an amount due from him on account to said holder, together with the amount due on said note after deducting the payment so to be indorsed; that the indorsement was made on the same day the summons in the pending action was served, and that the note, so indorsed, was not delivered to the defendant until several days afterwards. Held, that the court did not err in instructing the jury that there was no evidence from which they could find that the defendant was owner of the note when the action was commenced, and withdrawing that question from their consideration, for the title to the note did not pass until delivery, or, at least, until the amount to be indorsed was ascertained, and the indorsement made.”¹⁵

§ 537. A charge that “if the evidence does not affirmatively show that the subscribing witnesses to a will signed it in the presence of the testator, but only leaves the matter in doubt as to whether they did so attest it, then the jury should find against the will,” was held to have been properly refused; for, although the facts of the attestation might not affirmatively appear, nor exclude all doubt, yet the proof was a proper consideration for the jury; and, in such a case, it cannot be asserted as matter of law that the jury must find against the execution of the will.¹⁶

§ 538. In Pennsylvania, where a jury is called in cases of specific performance, it is held that where

¹⁵ *Dryden v. Britton*, 19 Wis. 22.

¹⁶ *Pool's Heirs v. Pool's Ex-ec'r*, 35 Ala. 18.

the facts are not such, in the opinion of the chancellor, as to justify him in decreeing a specific execution, he should give a binding instruction to that effect, and withdraw the case from them; but if the case is sufficient on the testimony, the jury are to be so instructed, and the truth of the facts is to be left to them, as the jury are not charged with administering the equities of a case further than to find the facts upon which they arise.¹⁷

§ 539. Where, on the joint trial of two prisoners for murder, the judge directed the acquittal of one, remarking, "I shall direct an acquittal as to him, although I think it not improbable that he was there," the other prisoner, it was held, had no right to complain, and was not entitled to a new trial, not being in any manner prejudiced by such remark.¹⁸

§ 540. The whole matter is summed up by the Supreme Court of the United States thus: "Correct instructions, if applicable to the case, the court, as a general rule, is required to give, unless the same are, in substance and effect, embodied in those previously given by the court to the jury; but the court is never required by law to give an instruction to the jury which is not applicable to the case, even though it be correct as an abstract principle, or rule of law; and it may be added, that no prayer for instruction, whether presented by the plaintiff or the defendant, can be regarded as applicable to the case, when it is wholly unsupported by the evidence introduced to the jury. Competent evidence may be written or oral, direct or

¹⁷ *Piersol v. Neill*, 63 Pa. St. 426.

¹⁸ *State v. Martin*, 70 N. C. 628.

circumstantial; but when there is no legal evidence of any kind to support the theory of fact embodied in a prayer for instruction, whether presented by the plaintiff or the defendant, the instruction should always be refused; and such a ruling can never become a good cause for reversing the judgment. It is clearly error in a court, said Taney, C. J., to charge a jury upon a supposed or conjectural state of facts, of which no evidence has been offered, as the instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the fact hypothetically assumed in that way by the court; and if there is no evidence which they have a right to consider, then the charge does not aid them in coming to a correct conclusion, but its tendency is to embarrass and mislead them, as it may induce them to indulge in conjectures, instead of weighing the testimony. When a prayer for instruction is presented to the court, and there is no evidence upon the subject in the case for the consideration of the jury, it ought always to be withheld; and if it is given under such circumstances, it will, as a general rule, be regarded as error in the court, for the reason that its tendency may be, and often is, to mislead the jury, by withdrawing their attention from the legitimate points of inquiry involved in the issue. Bills of exception ought to state that evidence was offered of the facts upon which the opinion of the court is prayed, else the court is under no obligation to give the instruction. Though the judge may refuse to declare the law to the jury on a hypothetical question, yet, if he gives the instruction, and it is erroneous, it is the

proper subject of revision. But the true rule, if there be no evidence to support the theory of fact assumed in the prayer, is to reject it, as it is error to leave a question to a jury in respect to which there is no evidence." ¹⁹

We perceive that directing a verdict is a necessary corollary to the general doctrine that instructions must be based on the evidence; and so where there is no evidence, no instruction is available except that which directs the proper verdict, being nothing left but a question of law as to the right of recovery or defence. (See Chapter IX., where the subject of abstract and inapplicable instructions is specially treated.)

CHAPTER XV.

INSTRUCTIONS, ESPECIALLY ADAPTED TO CRIMINAL CASES.

§ 541. THERE has been, in the course of progressive civilization, a very great transformation in the principles and modes of enforcing the laws against crime. Formerly an accusation was almost equivalent to a conviction, and especially as even, until a comparatively late period in England, an accused was not allowed a trial in the proper sense of the word. He could not have an appearance by counsel, nor a compulsory process for witnesses, nor the privilege of cross-examining the witnesses brought against him; nay, he

¹⁹ *Ins. Co. v. Baring*, 20 Wall. 161.

might even be condemned in his absence. But now the presumption of law is in favor of his innocence; he is entitled to counsel and witnesses, and to all the compulsory process of the court to enforce attendance, and he must be proven guilty to a moral certainty in order to justify a conviction. Even his confessions are not construed strongly against him, but judged of as any other evidence. They must be taken altogether, and not piecemeal. If part of a confession going to his acquittal is not disproved, the jury cannot be allowed arbitrarily to reject it, and go upon the portion which tends to criminate him, although if they find sufficient grounds for so doing, they may believe the portion which is against him, and reject the modifying clauses or passages offered in excuse. They are simply to judge of it as of any other evidence, not arbitrarily, but according to established rules.¹

And further, it is not enough that the court state partially the law of the case in a criminal proceeding. The accused is entitled to such a charge as the facts demand, and can enforce this right by appeal. And it is always to be presumed that a jury is capable of understanding a whole charge in its connected relations and application to the facts of the case.²

§ 542. It may be inquired if juries are judges of the law and fact in a criminal case, to what purpose is the instruction of the court, which can have no binding effect in law, since herein counsel have the same right to argue a question of law as a question

¹ *Crawford v. State*, 4 Cald. (Tenn.) 190.

² *People v. Bagnell*, 31 Cal. 412.

of fact? and the court cannot prohibit it, although having the power to regulate argument by reasonable rules; and the jury may even judge of the constitution as well as statute law. To this the Supreme Court of Indiana answers, that the court instructs the jury, in criminal cases, not to bind their consciences, but to inform their judgments; and the jury are not in duty bound to adopt the judge's opinion as their own.³

§ 543. And in Illinois, the rule as to criminal cases is laid down thus, as stated in the syllabus of a reported case: "The rule that an appellate court will not interfere to set aside a verdict unless it is palpably against the evidence, obtains in the largest sense in civil cases; but it is not applied to the same extent in criminal cases, especially where life is at stake. Hence, in a capital case, when the court, on considering the whole record, shall be satisfied justice has not been done, the case will be sent to another jury, and it need not appear that the first jury acted rashly by deciding against the evidence.

"While it is true that the jury, in the full sense, are, in a criminal case, judges both of the fact and of the law, and may be so instructed by the court, they should then be left to their own responsibility alone to decide on the guilt or innocence of the prisoner, giving to him the benefit of all reasonable doubts, without any reference to the possible future action of the Supreme Court. Hence an instruction which correctly states the right of the jury to judge of the

³ *Lynch v. State*, 9 Ind. 541.

law and the fact, and then concludes with the statement, that if they 'disregard the instructions of the court, and mistake the law to the prejudice of the prisoner, it would be the duty of the court to set aside the verdict,' is erroneous.

"In a capital case, where the instructions given by the court below do not announce correct legal principles, or, being correct, are inapplicable to the case, though no exceptions are taken to them, the appellate court, in the face of the record, will not pronounce sentence of death upon the prisoner, but will award a new trial." ⁴

§ 544. One of the most common points on which instructions are called for, is in regard to the degrees of crimes of the same class or character; it being the general rule, that a lower degree of the same crime, set forth in the indictment, may be found, where the evidence will justify it, and will not justify the higher conviction.

Where circumstances of cruelty towards a foster-child were so often repeated and long continued as to "manifest a heart totally regardless of social duty, and fatally bent on mischief," and death ensued, — the idea of passion being excluded, and that of malice only possible, — it was held proper to refuse a charge relating to manslaughter, as inapplicable.⁵ In Texas, it is held that, where the homicide may have been murder in the second degree, or manslaughter, the court should, without motion, explain to the jury the law which will reduce the offence to manslaughter.⁶

⁴ *Falk v. People*, 42 Ill. 331.

⁶ *Maria (a freedwoman) v.*

⁵ *State v. Harris*, 63 N. C. 5. *State*, 28 Tex. 698.

But a charge that if "the defendant did the stabbing under the influence of sudden passion, arising from the deceased beating her child, she would only be guilty of manslaughter," was held erroneous in not defining the extent and effect of the passion by which the offence might be reduced to manslaughter.⁷ And this: "In murder in the second degree, the design to kill is conceived and executed in a transport of passion, which renders the mind incapable of cool reflection, and deprives it of the power to weigh well the nature and consequences of the act," because it did not properly define the distinction between murder in the second degree, and manslaughter.⁷

In Georgia, an instruction concerning degrees in a capital case need not be given, unless called for by the state of the evidence.⁸ In New York, it seems, it should be given always.⁹

In Vermont, it is held that it is the duty of the courts, in trials for murder, first, to regard the accused as innocent, until he is proved guilty; and, secondly, after he is shown to have committed a homicide, to look for every excuse which may reduce the guilt to the lowest point consistent with the facts proved.¹⁰

§ 545. Where the court had properly instructed the jury as to the character of the doubt that should acquit, and as to what would reduce the homicide to a lower degree, and the elements of each degree, and then charged that, "if they were satisfied from the

⁷ *Maria (a freedwoman) v. State*, 28 Tex. 698.

⁸ *Washington v. State*, 36 Ga. 222.

⁹ *Fitzgerald v. State*, 37 N. Y. 413.

¹⁰ *State v. McDonnell*, 32 Vt. 492.

proof, that the accused was guilty of murder, they should simply say so; but if they believed otherwise, or were not satisfied, beyond a reasonable doubt, that she was guilty of murder in the first degree, then they should find her guilty of murder in the second degree, and proceed to assign the penalty," it was held that the instruction was not misleading, by inducing the belief that they were bound to find the prisoner guilty in any event of murder in the second degree, if failing on the first degree to convict, or that the doubts to the benefit of which the prisoner was entitled should be applied with less force to the lower than to the higher degree.¹¹

§ 546. In Kentucky, it is held that to leave to the jury to decide, without an instruction defining it, what constitutes legal provocation to reduce the offence from murder to manslaughter, is erroneous.¹² And so, in California, if the court charges the jury, on a trial for murder, that they are to determine whether the killing was "unlawfully" done by the prisoner, it should define the meaning of the word "unlawfully" in the connection in which it is used.¹³

§ 547. The court, it is held in Missouri, may direct a verdict of conviction where the evidence warrants it, this being regarded as no invasion of the province of the jury, nor even a comment on the evidence.¹⁴ But if the judge charges that the crime is murder or nothing, and conviction follows, the case will be re-

¹¹ *Monroe v. State*, 23 Tex. 210.

¹² *Payne v. Commonwealth*, 1 Met. 370.

¹³ *People v. Byrnes*, 30 Cal. 206.

¹⁴ *State v. Schoenwald*, 31 Mo. 147.

versed on error, if there is any view of the testimony which, if true, would reduce the offence to manslaughter.¹⁵ And the court may properly (in Georgia) express an opinion as to the grade of offence, so it is not done in the way of direction, and the omission or refusal of the grade of homicide, not authorized by the pleadings and proof, is not error.¹⁶ Nor is it in Texas.¹⁷ Nor in Missouri, when the circumstances show, beyond all question, the higher degree.¹⁸

§ 548. Care must be taken, however, not to blend distinct offences in assigning degrees. Thus, if an indictment charges a burglary, mixed with a larceny, the larceny is no part of the burglary, and not included in it, as manslaughter in murder. Nor are they interchangeable under the indictment; so that, where a case of the kind is conducted upon the theory that the prisoner is on trial for burglary alone; the court cannot, after the case is submitted and the jury have retired, change the issue by instructing the jury that they may find the prisoner guilty of grand larceny.¹⁹ And thus where, on an indictment for murder, the verdict was, that the prisoner was guilty of an assault and battery, and that he be fined, &c., the verdict was held a nullity, and equivalent to a verdict of acquittal.²⁰

§ 549. Where a jury, unable to agree, returned into court for further instructions, and were charged that, if they believed the witnesses, the case was clearly

¹⁵ *State v. Kirkland*, 14 Rich. (S. C.) 230.

¹⁶ *Choice v. State*, 31 Ga. 424.

¹⁷ *O'Connell v. State*, 18 Tex. 344.

¹⁸ *State v. Byrne*, 24 Mo. 151; *State v. Phillips*, *ibid.* 489.

¹⁹ *People v. Garnett*, 29 Cal. 622.

²⁰ *Wright v. State*, 7 Ind. 324.

within one of the degrees of manslaughter, and it was for the jury to say which degree, this further charge was held erroneous, as withdrawing from them questions of fact.²¹

If, however, a jury return with the general verdict of guilty, they may be directed to return and find in what degree.²²

§ 550. Where a charge relating to self-defence was given in these terms, "If a person kill another in his defence, it must appear that the danger was so urgent and pressing at the time of the killing, that, in order to save his own life, the killing of the other was absolutely necessary; and it must appear, also, that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was given," it was held correct.²³ But where the instruction was in these terms, "If the jury believe, from the evidence, that the defendant killed the deceased when there was reasonable apprehension on his part that the deceased was about to inflict upon him great bodily harm, then you should acquit the defendant," it was held to have been properly refused by the court below. And this, given in its stead, was held as favorable as would be proper for the defendant, namely: If one person unlawfully attacks another, the person so attacked may repel force by force. He may use as much force as he may reasonably think is necessary to repel the attack; and if the party be in

²¹ *Pfomer v. People*, Parker's C. R. (N. Y.) 558. ²³ *Hinch v. State*, 25 Ga. 701.

²² *People v. Bonney*, 19 Cal. 427.

imminent danger of life, or of receiving considerable bodily harm, or if the party may reasonably believe, under the circumstances, that he cannot avoid danger of life, or great personal harm, in any other way, in such case he may lawfully take the life of his assailant. In other words, a man may lawfully defend himself, and return blow for blow; but he cannot lawfully do more than he may reasonably think is necessary for his own defence.²⁴

And in another case in the same state, it was held error to charge the jury, without qualification, that if the prisoner "made an unlawful attack, or got into a fight with the deceased, upon a sudden heat, and slew him in the controversy, he would be guilty of manslaughter, at any rate; because, even under such circumstances, the defendant would be entitled to the benefit of any retreat, flight, or withdrawal from the contest which he might in good faith have made, or attempted to make, although he was the aggressor in the first instance."²⁵

A case arose in New York, for the history of which I avail myself of the very full syllabus of the reporter. "The provision of the Revised Statutes relative to justifiable homicide, as justly interpreted in the case of *Shorter v. People*, 2 N. Y. R. 193, is, that one who is without fault himself, when attacked by another, may kill his assailant, if the circumstances be such as to furnish reasonable ground for apprehending a design to take his life, or do him some great personal injury, and there is imminent danger

²⁴ *Fahnestock v. State*, 23 Ind. 257.

²⁵ *Hittner v. State*, 19 Ind. 49.

that such design will be accomplished, although it may afterwards turn out that the appearances were false, and there was in fact no such design, and no danger of its accomplishment. On a trial for murder, the jury were told that they were to find the prisoner guilty beyond a reasonable doubt; that the question for them to meet (the killing having been established beyond controversy) was, whether it was a justifiable homicide; and if they so found, their verdict must be one of acquittal; that if the prisoner had reason to believe that the deceased meant to take his life, or commit some great violence upon him, he had a right to resort to violence, and even to take life; that they were to inquire whether the circumstances, conduct, and acts of the deceased were such as fairly and reasonably to induce such belief; and if they were, that the prisoner was justified in acting on those appearances, whether they were real or feigned; that the inquiry was, whether the jury were satisfied that the prisoner, when he fired the gun, had reason to believe, under the circumstances then transpiring before him, that the deceased had a revolver, and was going to shoot him. Held that the charge presented to the jury the rule which justifies the taking of human life in self-defence in the most favorable aspect for the prisoner, and gave him the full benefit of the rule prescribed by the statute, as interpreted by the courts.

"The judge was requested to charge, that if the prisoner did really and in good faith apprehend such design and danger as above stated, then the jury should acquit, though the fact turned out to be that the prisoner was mistaken, and that no such design

or danger did in truth exist. The judge refused to charge in the form requested, 'that if the prisoner did really and in good faith apprehend,' &c., remarking that that turned entirely upon the operation of the prisoner's own mind, without regard to whether he had reason thus to believe. Held that the introduction or omission of the words objected to by the judge did not really vary the legal proposition which was clearly put in the charge, and substantially repeated in the language of the judge in responding to the request, and that such refusal to charge was not a ground of error.

"The judge was also requested to charge the jury, that if they believed the prisoner was a private soldier, and saw his superior officer unlawfully resisted in the performance of his duty, and believed that he was ordered to fire, and did so in obedience to what he supposed a lawful command, then they should acquit. This was declined. Held that, there being no testimony going to establish any such condition of things as would warrant such a command, even if the officer had power to give it, nor evidence to show that at the time the homicide was perpetrated the officer was being resisted in the performance of any duty, the proposition was a mere abstraction, unwarranted by any facts appearing on the trial; and the instruction was, therefore, properly refused."²⁶

§ 551. As to premeditation, which is an essential element in the crime of murder in the first degree, the court, in one case, charged, that if a design to

²⁶ *Patterson v. People*, 46 Barb. 626.

kill was formed "at the time the blow was struck with the knife, it is a wilful, deliberate, premeditated killing, and, therefore, murder in the first degree;" and it was held erroneous because the design should be formed before the blow was struck, in order to constitute murder.²⁷ But the following was held a sufficient instruction on that point: "If there be sufficient deliberation to form a design to take life, and to put that design into execution by destroying life, there is sufficient deliberation to constitute murder, no matter whether the design be formed at the instant of striking * the fatal blow, or whether it be contemplated for months."²⁸

§ 552. So where one had been insulted, and followed up the offender with a deadly weapon to take revenge, and when he overtook him, seeing him put his hand to his side as if to draw a pistol, struck him down with a fatal blow from his gun, and on the trial the court was asked to charge that this state of facts would justify a verdict of manslaughter, it was held properly refused.²⁹

§ 553. Where, under an indictment for the murder of a wife, the circumstances were such as did not exclude the possibility of suicide by the deceased, and the court charged that "it might be necessary to decide by what means the deceased came to her death, whether she had a motive to commit suicide, and, if

* There would seem to be a conflict of authority here.

²⁷ *Fonts v. State*, 4 *Greene* (Iowa) 500.

²⁹ *State v. Owen*, *Phill. (S. C.)* 427.

²⁸ *O'Brien v. People*, 48 *Barb.* 275.

so, whether it had been shown beyond a reasonable doubt that she did not kill herself, or die from accidental causes: you will also consider whether it was possible or probable that she committed suicide, or died accidentally by the means of which you believe she died," — it was held that this charge, presented in its proper relations and connections, was not objectionable as having a tendency to throw upon the defendant the burden of proving that the deceased committed suicide, and that, failing in this, to warrant the inference that he committed the murder charged.³⁰

§ 554. It is held the duty of the court clearly to instruct the jury as to the distinction between express and implied malice, for the term "express malice" is purely technical; and it is not to be supposed that a jury will be able to determine whether a murder is of the first or second degree by being told that murder committed without express malice is of the second degree.³¹

The following instruction in relation to malice was held correct, and not liable to the objection urged of confining the jury, in their investigation of the question of excuse or provocation, to the evidence introduced by defendant; namely: "If the act producing death be such as is ordinarily attended with dangerous consequences, as by the use of a deadly weapon, or be committed deliberately, the malice will be presumed, unless some sufficient excuse or provocation should be shown; for the law infers that the natural or pal-

³⁰ *Wyler v. State*, 25 Tex. 182.

³¹ *Villareal v. State*, 26 Tex. 107.

pable effects of any act deliberately done were intended by the agent.”³²

§ 555. A court may specify particular circumstances of illustration in charging upon the subject of malice aforethought; as where an instruction was given that “a man shall be taken to intend that which is the immediate or necessary consequence of his acts, — as if a man was seen, within shooting distance of another, to raise his gun, and take aim, and fire, and the man falls, the ball having inflicted a mortal wound, the taking aim and firing such a weapon — one from which death would most likely ensue — would of itself be *prima facie* evidence that he intended it; and it is therefore a wilful, deliberate, and premeditated killing.” This was held correct, on the ground that “malice is legitimately inferred from the weapon used; and where the killing is with a dangerous weapon calculated to produce, and actually producing, death, in the absence of proof that it was accidental or upon provocation, the presumption of law is, that the act was voluntary and with malice aforethought.”³³

But, in the same case, a specified instruction was held somewhat misleading and objectionable; namely, “The question whether the act of killing was done with deliberation and premeditation must depend upon the following facts: (1) The fact that the defendant had previously had a difficulty with his wife when he had been drinking; (2) The infliction of a deadly wound with a deadly weapon in the defendant’s previous possession, without any provocation; (3) The

³² *Mask v. State*, 36 Miss. 77.

³³ *State v. Gillick*, 7 Clarke (Iowa) 311.

declaration of defendant, made to a witness, that he had done what he wanted; and (4) The declaration of the deceased that she had been murdered by the defendant."

The court say, concerning it, "The question was left to the jury to decide whether deliberation and premeditation were inferable from these facts. If the charge of the court is to be understood as assuming these facts to be proved, we think the court erred in so assuming, and in directing the jury what inferences might be drawn from them as proved. It should have been left to the jury to say whether the facts were proved. There would have been no error in directing them that, if they judged such and such facts were proved, they were at liberty to draw the legitimate inferences from them. It would have been preferable, also, if the charge had been so framed as that the jury might not be led by it to conclude that these were the only facts from which deliberation and premeditation by defendant may be inferred."³⁴

§ 556. Ignorance of the law is no excuse for a criminal violation thereof; and so it was held not error to refuse an instruction, "That where a party is indicted for a violation of a penal statute, it is necessary to a conviction that such party did knowingly and wilfully violate the statute," — the principle being that every man is bound to know the law.³⁵

§ 557. Where a defence of former acquittal is raised, it is error for the court to refer to the jury the

³⁴ *State v. Gillick*, 7 Clarke (Iowa) 311.

³⁵ *Whitten v. State*, 37 Miss. 382.

question of the sufficiency of an indictment, this being a question of law to be decided by the court,³⁶ unless in a state where the jury are judges of the law and fact, when, I suppose, it would belong to them.

§ 558. Where a court instructs the jury as to the abstract principle of the right of taking life in self-defence, and then states a hypothetical case falling within the principle, the hypothetical statement is not to be construed as informing the jury the right of taking life in self-defence is confined to the hypothetical case stated.³⁷

CHAPTER XVI.

CRIMINAL EVIDENCE.

§ 559. HEREIN we consider, first, the quality, and, second, the degree of evidence to be adduced in criminal causes in relation to the instructions thereunto pertaining.

The credibility due to certain witnesses is a primary subject of attention. And as to the statements of a prisoner himself, where a judge charged the jury in regard to a statement made by an accused, under the Michigan statute of 1863, that "he did not think such statement would warrant them in setting aside unimpeached sworn evidence," it was held erroneous, because, if the jury believed such statement to be true, against sworn evidence to the contrary, there is no

³⁶ *People v. Cook*, 10 Mich. 168.

³⁷ *People v. Campbell*, 30 Cal. 312.

arbitrary rule of law to prevent them from acting upon such belief; and the jury is not bound in any case to give credit to sworn testimony, though unimpeached, any further than they do in fact believe it to be true. "There may be," the court remark, "something in the demeanor of the witness—his apparent intelligence, powers of observation, or memory, or the inherent improbability of his story, or the peculiar circumstances of the case, or the witness's relation to it, and many other considerations—which may render his evidence, in the opinion of the jury, more or less improbable and unreliable, while the statement of the defendant may be so consistent with itself and with the circumstances of the case, and so natural and probable, as to produce a conviction of its truth. There can be no test for the comparative weight which the statement or the sworn evidence shall have with the jury; but the greater or less conviction of its truth which either may, in fact, produce upon their minds, after taking into consideration the temptation under which the defendant is placed in making the statement, and all the evidence and circumstances of the case." ¹

§ 560. But care must be taken not to assume a confession, where it does not appear in the evidence; and, on this ground, the following instruction, given in a case of murder, was condemned: "You may give to the defendant's admissions and confessions such weight as you may deem them entitled to." ²

§ 561. Evidence making a mere ground of conjec-

¹ *Durant v. People*, 13 Mich. 356.

² *People v. Strong*, 30 Cal. 157.

ture that a homicide was accidental, amounts to no proof at all; and so a charge was held properly refused, that "if the prisoner was handling the gun in a careless and negligent manner, and it accidentally went off, the killing was mitigated to manslaughter," where the only evidence was, in regard to this point, that the prisoner afterwards said he had killed deceased, but did not know the gun was loaded; that the gun was out of order, and that therefore it would not stand at half cock.³

§ 562. It has been held erroneous to charge, as to the omission of a prisoner to make a statement when he has opportunity. So, where the instruction was, that "Where all the circumstances proved raise a strong presumption of the guilt of the accused, his failure to offer any explanation when it is in his power to do so, tends to confirm the presumption of his guilt," it was condemned.⁴ And so it is error to allow the omission of an accused to call his wife to testify on his behalf, to be urged upon the jury as a circumstance tending to prove guilt. The privilege of calling her or not, at his option, would be done away with, if any inference of guilt were thus to be permitted, and it was not the design of the law allowing it to interfere with the harmony and confidence of the marital relation.⁵

§ 563. Where the jury were instructed that the burden of proof was on the state to prove defendant's guilt, and he must be presumed innocent until con-

³ State *v.* Haywood, Phill. (N. C.) 376.

⁵ Knowles *v.* People, 15 Mich. 409.

⁴ Doan *v.* State, 26 Ind. 495.

clusively proved guilty, it was held not error to refuse to charge, in so many words, that the burden of proof did not shift, during the trial, to the prisoner.⁶

§ 564. In relation to circumstantial evidence, it is proper to instruct that guilt may as well be proved thereby as by positive evidence; and also that there is nothing legally or morally wrong for persons to lay a trap or conspire with others to detect a culprit, this having nothing to do with the guilt of an accused.⁷ The rule as to the effect of circumstantial evidence is, that if it is not only consistent with the guilt of the prisoner, but inconsistent with any other rational conclusion, the law makes it the duty of the jury to convict, notwithstanding such evidence may not be as satisfactory to their minds as the direct testimony of credible witnesses. And this instruction was sustained: "In order to convict, circumstantial evidence should be such as to produce nearly the same degree of certainty as that which arises from direct testimony, and to exclude a rational probability of innocence."⁸

§ 565. In Iowa, when the court grouped together many legitimately provable facts, which the evidence tended to establish, and instructed the jury that "such facts as these, if shown by the testimony, constitute circumstantial evidence; circumstantial evidence is legal evidence, and convictions had upon it are legal convictions; the jury will look at all the evidence, and from it make up their minds as to the guilt or innocence of the defendant," it was held that, while

⁶ *Crilley v. State*, 20 Wis. 231.

⁸ *People v. Cronin*, 34 Cal.

⁷ *O'Halloran*, 31 Ga. 209.

191.

such a mode of instructing should not be encouraged, yet it was not necessarily erroneous, and that although all the facts thus grouped were against the defendant, this was not error, since it was competent for the prisoner to ask an instruction, grouping the facts in his favor.⁹

§ 566. An instruction that the jury might consider "all the facts and circumstances surrounding the parties at the time of the deed," is held proper, and is to be construed as extending to antecedent threats.¹⁰ But there is this limitation, that the instruction is to be understood as referring only to all the facts in evidence.¹¹ And the court may recite the evidence claimed by the parties, where this is done fairly, for the purpose only of a proper explanation of the law applicable to the case.¹²

§ 567. In the very able charge delivered in the celebrated Webster-Parkman case, there is an extended explanation of circumstantial evidence which will furnish us with a proper rule in charging on this subject. We are confined by our space to a few extracts.

"The distinction, then, between direct and circumstantial evidence is this. Direct or positive evidence is when a witness can be called to testify to the precise fact which is the subject of the issue on trial; that is, in a case of homicide, that the party accused did cause the death of the deceased. Whatever may be the kind or

⁹ *State v. Carnahan*, 17 Iowa, 256.

¹⁰ *Johnson v. State*, 27 Tex. 758.

¹¹ *People v. Kelley*, 28 Cal. 423.

¹² *Mimms v. State*, 10 Ohio St. 222.

force of the evidence, this is the fact to be proved. But suppose no person was present on the occasion of the death, and, of course, that no one can be called to testify to it: is it wholly unsusceptible of legal proof? Experience has shown that circumstantial evidence may be offered in such a case; that is, that a body of facts may be proved of so conclusive a character as to warrant a firm belief of the fact quite as strong and certain as that on which discreet men are accustomed to act in relation to their most important concerns. It would be injurious to the best interests of society if such proof could not avail in judicial proceedings. If it were necessary always to have positive evidence, how many criminal acts committed in the community, destructive of its peace, and subversive of its order and security, would go wholly undetected and unpunished!

"The necessity, therefore, of resorting to circumstantial evidence, if it is a safe and reliable proceeding, is obvious and absolute. Crimes are secret. Most men, conscious of criminal purposes, and about the execution of criminal acts, seek the security of secrecy and darkness. It is necessary, therefore, to use all other modes of evidence besides that of direct testimony, provided such proofs may be relied on as leading to safe and satisfactory conclusions; and thanks to a beneficent Providence, the laws of nature and the relations of things to each other are so linked and combined together that a medium of proof is often thereby furnished, leading to inferences and conclusions as strong as those arising from direct testimony.

"On this subject I will once more call attention to a remark in the work already cited — East's Pleas of the Crown, c. 5, § 11. 'Perhaps,' he says, 'strong circumstantial evidence in cases of crime like this, committed for the most part in secret, is the most satisfactory of any from whence to draw the conclusion of guilt; for men may be seduced to perjury by many base motives, to which the secret nature of the offence may sometimes afford a temptation; but it can scarcely happen that many circumstances, especially if they be such over which the accuser could have no control, forming together the links of a transaction, should all unfortunately concur to fix the presumption of guilt on an individual, and yet such a conclusion be erroneous.'"¹³

§ 568. When the defence of an *alibi* is set up, it devolves, of course, upon the defendant to prove it to the satisfaction of the jury; but the weight of the evidence is exclusively for them; so that it was held error to instruct that "an *alibi* is a species of defence often set up in criminal cases, and one which seems to figure in this case," since the language was well calculated to give the impression that the court regarded that particular defence as a pretence without foundation in truth.¹⁴ But in the Webster charge before cited, it is said concerning this defence, "This is a defence often attempted by contrivance, subornation, and perjury. The proof, therefore, offered to sustain it is to be subjected to a rigid scrutiny, because, without attempting to control or rebut the evidence of

¹³ Commonwealth v. Webster,
5 Cush. 310.

¹⁴ Walker v. State, 37 Tex.
367.

facts sustaining the charge, it attempts to prove affirmatively another fact wholly inconsistent with it; and this defence is equally available, if satisfactorily established, to avoid the force of positive as of circumstantial evidence. In considering the strength of the evidence necessary to sustain this defence, it is obvious that all testimony tending to show that the accused was in another place at the time of the offence, is in direct conflict with that which tends to prove that he was at the place where the crime was committed, and actually committed it. In this conflict of evidence, whatever tends to support the one tends, in the same degree, to rebut and overthrow the other, and it is for the jury to decide where the truth lies.”¹⁵

§ 569. As to dying declarations, where a judge instructed the jury that these are evidence of facts, upon the ground that “statements are more worthy of credence, when made under such circumstances, than if made under the sanctity of an oath, duly administered according to law,” and then stating rules concerning the admissibility of such declarations, added, “If these facts appear from the evidence, under the foregoing rules of law, it becomes the highest testimony known, and must receive full faith and credit by the jury,” it was held error on two grounds; (1) as being on the weight of evidence; and (2) as raising hearsay testimony to the grade of the highest testimony known; whereas dying declarations are exceptional merely, and it belongs to the jury to estimate their value in each case.”¹⁶

¹⁵ 5 Cush. 319.

¹⁶ Walker v. State, 37 Tex. 366.

§ 570. Where a judge emphatically asks, in a charge, "Where is the evidence to establish this fact?" it will be taken that he means to deny that there is any evidence.¹⁷ And in the absence of evidence, a verdict of acquittal may be directed,¹⁸ although, probably, not of conviction.

§ 571. Where the facts adduced by the prosecution were not a series of dependent circumstances, it was held not error to instruct the jury that, though the state had failed to establish any one or more of the facts relied on for conviction, yet if enough had been shown to satisfy them beyond a rational doubt of the defendant's guilt, it would be their duty to convict.¹⁹

§ 572. The definition of reasonable doubt is thus given in the Webster charge, previously cited: "Then what is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt, because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge."

It is held, in North Carolina, that an instruction on the matter of reasonable doubt may be properly submitted if the rule has been properly laid down by

¹⁷ *State v. Simmons*, 6 Jones (N. C.) 21.

¹⁹ *State v. Frank*, 5 Jones (N. C.) 384.

¹⁸ *Benedict v. State*, 14 Wis. 427.

defendant's counsel, and admitted by the prosecuting attorney.²⁰

§ 573. The definition given by the Supreme Court of Mississippi is, "That which amounts to mere possibility only, or to conjecture or supposition, is not what is meant by a reasonable doubt. The doubt which should properly induce a jury to withhold a verdict of guilty should be such a doubt as would reasonably arise from the evidence before them."²¹ In Wisconsin, a definition given in an instruction was held entirely too strong, namely: "The evidence in this class of cases [larceny], to authorize a conviction, must be such as will exclude every theory and hypothesis except that of the guilt of the defendant," the court holding the true rule to be, that the evidence must be such as to satisfy the jury, beyond a reasonable doubt, of the defendant's guilt.²²

In Kentucky, this instruction was condemned: "If they have a reasonable doubt of the truth of any fact, any series of facts or propositions necessary and essential in their judgments to the conclusion of guilt, that the prisoner is entitled to the benefit of that doubt, and they must acquit him,"²³ because it failed to inform them what were the essential facts necessary to be made out before they could find the prisoner guilty of any offence.

§ 574. It is held that a prisoner is entitled, where the evidence is wholly circumstantial, and there is nothing to connect him directly with a homicide, to a

²⁰ State v. Johnson, 3 Jones, 266.

²² State v. Ford, 21 Wis. 610.

²³ Sparks v. Commonwealth,

²¹ Bowler v. State, 41 Miss. 571.

3 Bush. 117.

full and clear instruction as to what the law means by a reasonable doubt.²⁴

§ 575. Where the instruction was asked that the prisoner was entitled to a verdict, "unless the evidence was such as to exclude to a moral certainty every supposition but that of his guilt," it was held not error to add thereto the explanatory clause, "this only means that the jury must be satisfied beyond a reasonable doubt of his guilt."²⁵ And, also, where the court refused to instruct that "the defendant is entitled to the benefit of every reasonable doubt upon every material fact in the case," substituting the instruction that "the defendant is entitled to the benefit of every reasonable doubt of his guilt remaining in the minds of the jury after canvassing the whole of the testimony in the case," it was held correct.²⁶

Also, where the court refused to instruct the jury that, "If the proof of the case rests upon circumstantial evidence, then they must be satisfied that the government has proved such a coincidence of circumstances as excludes every hypothesis except the guilt of the prisoner; and unless they are satisfied that the proof of circumstances offered by the government does exclude every other hypothesis except the guilt of the prisoner, then they ought not to convict the defendant;" and instead instructed, that "the government was bound to prove the defendant guilty beyond all reasonable doubt and to a moral certainty, and

²⁴ *People v. Lachanais*, 32 Cal. 433.

²⁶ *Wise v. State*, 2 Kan. 419.

²⁵ *Turbeville v. State*, 40 Ala. 715.

unless the evidence in the case satisfied them to that extent, they ought to acquit the defendant.”²⁷

Also, it is held no reversible error for the court to refuse to charge concerning reasonable doubt, when there was no room for such doubt on the evidence;²⁸ since the jury should not be coaxed into a doubt by instructions.²⁹

§ 576. As to a penalty on conviction, it is held, that, where there are several offences charged in the same indictment, they must be treated as distinct in the instructions given to the jury.³⁰

§ 577. An instruction that, “although death did not ensue from the deed, yet the malice aforethought was equally implied from the act as though death did ensue,” was, in Louisiana, judged erroneous, because it implied an opinion on the act proved which the judge was prohibited from giving.³¹

§ 578. In civil cases, where a criminal act is so set out in the pleadings as to raise that distinct issue before the jury, the crime charged must be proved beyond a reasonable doubt before the plaintiff is entitled to a verdict; but where no such issue is raised by the pleadings, the jury may decide upon the preponderance of evidence.³²

§ 579. There is no “formula” to which judges may resort for gauging the degree to which a jury must

²⁷ *Commonwealth v. Goodwin*,
14 Gray, 56.

²⁸ *McGuire v. State*, 37 Miss.
370.

²⁹ *State v. Schoenwald*, 31
Mo. 147.

³⁰ *Maul v. State*, 25 Tex. 166.

³¹ *State v. Munco*, 12 La. An.
625.

³² *Sinclair v. Jackson*, 47 Me.
102.

be convinced in order to justify a verdict of guilty; and all attempts to establish such have resulted in no good.³³

CHAPTER XVII.

SPECIFIC APPLICATIONS.

§ 580. THE Supreme Court of Illinois, in a certain case, animadverted on the multiplicity of instructions thus: "The only question of law was as to the liability of the defendant to pay for bricks obtained for him, and used for his benefit. The right to demand instructions must have some limit, and we are not disposed to sanction its abuse. Sixteen instructions in this case could not have been required, on the part of the defendant, for the purpose of merely enlightening the jury upon the law of the case, and were well calculated to confuse and mislead them."¹

§ 581. Where a verdict was rendered on Sunday, whereas Saturday was the last day of the term, it was sustained, under these circumstances: The jury returned, at twelve o'clock on Saturday night, with the report that they could not agree. The plaintiff then asked the court to instruct them whether a verdict on Sunday, after the expiration of the term, would be valid, and whether they were bound to deliberate longer. The court refused any instruction in terms, but virtually instructed them by saying that they were

³³ *State v. Parker*, Phill. (N.C.)
477.

¹ *Fisher v. Stevens*, 16 Ill.
400.

sworn, and had better do their duty, and directing them to retire. The Supreme Court held that a verdict may be returned and received on Sunday; but the judge cannot receive it at his house, or elsewhere out of court.² But I do not think this case can ever be drawn into precedent even in the state where it occurred.

§ 582. In capital criminal cases, the same strictness as to requesting is not required as in civil cases. The court may be in error even where there has been no request for further instructions therein.³

§ 583. In Illinois, a judgment will not be reversed because the words "from the evidence" were left out of an instruction after the word "believe," unless it appears affirmatively to have thereby misled the jury.⁴

§ 584. It is not error in a court to refuse to instruct as to the exceptions to the law generally stated, unless there is evidence tending to bring the case at bar within the exceptions, even in a criminal proceeding.⁵

§ 585. Refused instructions should not be read in the presence and hearing of the jury.⁶

§ 586. An instruction that assumes that the jury will render a verdict in favor of any particular party is erroneous.⁷

§ 587. Where there are two issues fairly presented by the pleadings and evidence, it is error for the judge in his charge to submit the case on one of them

² Rosser *v.* McColly, 9 Ind. 587.

³ Phipps *v.* State, 3 Cold. (Tenn.) 344; State *v.* McNamara, 3 Nev. 70.

⁴ Holliday *v.* Burgess, 34 Ill. 193.

⁵ State *v.* Downer, 21 Wis. 277.

⁶ Waldie *v.* Dall, 29 Cal. 556.

⁷ Hawk *v.* Ridgway, 33 Ill. 473.

only, if testimony has been adduced to establish the other; it is for the jury to decide upon the sufficiency thereof.⁸

§ 588. A judge cannot be required to rule upon the force and effect of testimony upon each position as it is adduced, nor to express his views as to the relative condition of parties, as to the burden of proof at successive stages of the trial.⁹

§ 589. In an action on a promissory note, in which the defence was want of consideration, there was a request to instruct that the note was *prima facie* evidence of consideration; and if they were not satisfied of the truth of the defendant's evidence, the verdict must be for the plaintiff. This was refused, the judge instructing the jury, that, though the law was so, he could not so charge them, because there was other evidence besides the note, and they must, on considering all the evidence, find a verdict on a fair preponderance of evidence, the burden of proof being on the plaintiff. Held correct.¹⁰

§ 590. In an action for malicious prosecution, it is error, in connection with a correct charge as to what constitutes probable cause, to make such observations to the jury as may lead them to infer that the guilt or innocence of the plaintiff of the criminal charge was a question in the cause.¹¹

§ 591. A plaintiff may raise a question of law arising out of the facts enumerated in an instruction, and

⁸ Smithwick v. Andrews, 24 Tex. 488.

⁹ Hovey v. Hobson, 55 Me. 256.

¹⁰ Morris v. Bowman, 55 Me. 467.

¹¹ Fisher v. Forrester, 33 Pa. St. 501.

to demand an opinion on it, not as conclusive of his right to recover, but as ancillary to that right.¹²

§ 592. A jury ought not to be left to construe and determine the effect of pleadings,¹³ although, while it is the province of the court to determine from the pleadings what allegations are admitted, and what denied, directions as to such admissions or denials will be given to the jury only when the condition of the pleadings makes it necessary.¹⁴ And a charge that under the evidence does not correctly construe a contract involved in the issue is not to be regarded as erroneous if it express the same idea as that conveyed by the plea which sets it up as a defence.¹⁵

§ 593. On the matter of private negligence, an interesting case arose in Texas, of which I avail myself of the syllabus of the reporter, namely, —

"The following charge, given in the court below, held to be erroneous, viz: 'The plaintiff would not be guilty of such negligence as would preclude him in a proper case from recovering if he was guilty of no other negligence than permitting his stock to remain in the range which he used with others as public range before the diseased stock of defendant made its appearance. If, however, plaintiff, or his agent, knowingly permitted his stock to run with the diseased stock of defendant on that portion of defendant's own land, where defendant's stock were kept and herded, after having knowledge of the disease, and

¹² Parkhurst v. R. R. Co. 19 Md. 479.

Iowa, 273; Potter v. Wooster, ibid. 334.

¹³ Hall v. Renfro, 3 Met. (Ky.) 52.

¹⁵ Fort v. Barnett, 23 Tex. 460.

¹⁴ Fannon v. Robinson, 10

thereby his stock became diseased, and his loss resulted, he would not, in that event, be entitled to recover.'

"The first part of this charge would leave the impression, that if the plaintiff's stock were in that range, he having before that time used it in common with others, it was not negligence in him to let them remain there as before; and if loss resulted to the plaintiff, the defendant would be responsible. This is not correct: when the plaintiff was warned of the danger, it was equally incumbent on him to keep his stock away from the defendant's, as it was upon the defendant to keep his upon his own premises, and prevent their running at large, and communicating the disease to the plaintiff's stock. If there was danger, and the plaintiff was apprised of it, and by the use of ordinary diligence could have avoided the injury to his own stock, his failure to do so was negligence, and he cannot hold the defendant responsible. If the plaintiff negligently suffered his stock to mix with the defendant's upon defendant's premises or elsewhere, having been apprised of the danger, he could not recover.

"But the principal objection to the latter part of the charge is, that it leaves an inference that, to prevent a recovery, the injury must have been occasioned solely by the plaintiff's negligence, suffered in a particular manner. To entitle the plaintiff to recover, he must have satisfied the jury that he had used ordinary care, or that the injury was wholly attributable to the defendant's fault.

"The jury having asked, 'Would defendant's en-

closed lands be considered his premises? If yea, and the defendant or agent permitted his stock to run at large at night, would it be negligence in the plaintiff or agent to suffer his stock to do the same?' to which the court answered, 'It would not;' this was held objectionable as a charge upon the weight of evidence, and also erroneous in making defendant's negligence an excuse for plaintiff's. The rule of law in this class of cases is, that if, by ordinary care, the plaintiff might have avoided the consequences of the defendant's negligence, he is not entitled to recover."¹⁶

§ 594. While a father will be held liable in trespass for an injury committed by his team when driven by a son, with whom he was riding at the time, and while a binding direction to the jury that he is so liable would be error, yet where the question of liability under the evidence is fairly left to the jury, under instructions that the defendant was only answerable for carelessness or wilful misconduct, and not if the damage resulted from accident or mutual negligence, the judgment will not be reversed on a verdict for the plaintiff.¹⁷

§ 595. As to negligence in public carriers, it has been held not error to instruct that if an express company, to whom a note is intrusted, fails to show the circumstances of the loss, it may be presumed to have been lost through negligence. When a party is intrusted with property for which afterwards he is unable to account, if it does not amount to a legal presumption of carelessness, it is at least so far conclusive that an

¹⁶ Walker v. Herron, 22 Tex. 55.

¹⁷ Strohl v. Levan, 39 Pa. St. 177.

appellate court will not reverse for the giving of such instruction.¹⁸

§ 596. When a court instructs a jury that reasonable diligence is required in the taking possession by the mortgagee of a chattel, it should also inform them what facts in reference to the case at bar would constitute reasonable diligence.¹⁹

§ 597. Where suit was brought to recover price paid for goods which had been lost in transportation by reason of a failure to put the plaintiff's name or residence on them, or in the bill of lading, and the jury were instructed that the vendor might remedy the omission by subsequent information to the carrier, and furnishing the purchaser vouchers to show his title to the goods, these vouchers being accepted as sufficient by the plaintiff, who, on receiving them, undertook to see to the forwarding of the goods, without further assistance from the vendor, and that both the information to the carrier and the vouchers were necessary, in order to put the carrier and the purchaser in the position in which they would have been if there had been no failure of legal obligation on the part of the vendor, it was held that the vendor had no ground of exception, and that if goods are destroyed under such circumstances *en route*, the plaintiff's claiming them, and endeavoring to have them forwarded to him after the vendor's failure, will not operate as a waiver, unless he intended a waiver.²⁰

§ 598. As to the submission of a lease, a case is

¹⁸ Express Co. v. Parsons, 44 Ill. 313.

²⁰ Finn v. Clark, 12 Allen, 522.

¹⁹ Barbour v. White, 37 Ill. 164.

reported from the Supreme Court of the United States, of which the syllabus is as follows: "A sued B for rent, as a co-lessee with C; B, admitting his mere signature, set up, in defence, that he had signed the lease with the express understanding between him and A that one D would also sign it; and that it was then proposed by A to have C in the place of A, but that B positively objected to having his name on a lease with C; that thereupon A said it would make no difference, for that he would release B. C now signed. Some evidence tended to prove these facts, and some to prove a different state of facts. The court submitted it to the jury whether there had been any acceptance of the lease by B. Held that this was equivalent to submitting to them whether the instrument had been delivered at all as the deed of B, and that this was a proper submission, and that it was not (as contended by plaintiff in error) to submitting whether the deed had been delivered and accepted by B on condition that he should be released afterwards — a submission which, it was admitted by the court, would not stand on the same footing.²¹

§ 599. Where there was an issue on the genuineness of a deed, this instruction was given: "If there is a reasonable theory consistent with the evidence by which the jury can find in favor of the genuineness of the deed, and consistent with the honesty and truthfulness of all the witnesses in the case, it is the duty of the jury to adopt that theory in preference to one by which perjury or forgery may be involved on

²¹ *Wadsworth v. Warren*, 12 Wall. 307.

the part of a portion of the witnesses." Held no error.²²

§ 600. A court may state the claim of each party as disclosed by the evidence, and charge the law thereon, and instruct as to the legal effect of any one of several facts relied upon to establish a waiver, leaving it to the jury to pass upon the general question from all the evidence in the case.²³

Where there is a set-off in an action on a promissory note, instructions founded altogether upon admissions of the execution, and non-payment of the note declared on, and not referring in any way to evidence offered under the plea of set-off, are bad. And where a portion of the testimony offered tends to support the plea of set-off, but other portions of it, if believed, may be sufficient, in their judgment, supported by a proposition of law properly deducible therefrom, to establish a case which would defeat that defence, an instruction based upon the evidence under the plea of set-off is also bad.²⁴

§ 601. Where, in an action for breach of promise of marriage, the declaration alleged the agreement to marry, and the readiness of plaintiff to comply therewith, and the answer admitted the agreement, and alleged the readiness of defendant to comply, except that the plaintiff refused except on new and unreasonable conditions, it was held that an instruction that, if the defendant promised to marry the plaintiff, and failed to fulfil his promise, the burden was on him to

²² Wright *v.* Carillo, 22 Cal. 597.

²⁴ Schillinger *v.* Kratt, 25 Md. 49.

²³ Grout *v.* Nichols, 53 Me.

justify his failure on the grounds he alleged, was held erroneous, because, in the view of the court, this was not in the nature of a confession and avoidance, but a mere denial, and so had no effect in shifting the burden of proof.²⁵ But I do not think this would be generally followed as a precedent.

§ 602. Fraud constitutes a large subject of litigation. And where there is any evidence showing that a mortgage was executed to defraud creditors, the court may properly refuse to instruct that proof of the genuineness of the debt secured by the mortgage is sufficient to establish the validity of the mortgage.²⁶

An objection does not lie to an instruction as assuming facts as proved, which states that, if the defendant did certain acts specified, they should infer a fraudulent intent.²⁷

But, in a suit for breach of warranty, it is error for a court to charge concerning fraud in the sale, since in such an action the jury have nothing to do with the question of fraud.²⁸

Where a merchant, largely in debt, sells out his goods, being all his property, on long time, the court must, on request, instruct the jury that a long and unusual mercantile credit is a badge of fraud to be considered by them.²⁹

But, in a case where the evidence tends to prove fraud, an instruction is erroneous that "fraud is not

²⁵ *Hook v. George*, 108 Mass. 330.

²⁶ *Stebbins v. Miller*, 12 Allen, 591.

²⁷ *State v. Thompson*, 19 Iowa, 299.

²⁸ *Wallace v. Wren*, 32 Ill. 150.

²⁹ *Pilling v. Otis*, 13 Wis. 495.

to be presumed, but must be proved by those alleging it." ³⁰

Where a note was given in the purchase of a horse, and afterwards negotiated, and the indorsee brought suit against the maker, and the pleas were failure, and partial failure, and want of consideration, it was held error to instruct that, "to sustain the defendant's plea of fraud, it must be proved that there was fraud, by the payee of the note, in the sale of the horse to the maker, and that there was fraud between the assignee and payee of the note in the transfer of the note, and that it must be proved that the assignee was notified of the fraud between the payee and the maker in the sale of the horse before he purchased the note," since there was no allegation of fraud in the case.³¹

§ 603. In an action on fraudulent representations in the sale of lands, this instruction was given: "That, if the only testimony before them, in relation to the quality of the land, is such representations as may be detailed to you by witnesses, uncorroborated by anything in writing, or any facts surrounding the transaction, such evidence should be carefully looked to by the jury; but the declarations and representations of the defendant, in regard to the quality or condition of the land, during the trade, are important evidence, and should be considered by the jury," — and was held correct, on error. And the court refused to charge that "hearsay evidence, or what may be said by parties, which may be given in evidence by witnesses, is or may be, according to circumstances, the

³⁰ Causey, Ex'r, v. Wiley, 27 Ga. 444.

³¹ McKay v. Bellows, 8 Fla. 32.

weakest kind of testimony;" and it was held that the refusal was proper, because the effect of the instruction, if given as asked, would have been to attach the character of hearsay to the evidence given by the witnesses as to what was said by the parties, at the time the agreement was made, as to the quality and character of the land.³²

§ 604. A case occurred in Texas, in regard to an alleged fraudulent conveyance, of which the following is the syllabus: "Where, on a question of fraud, the court has, at the request of one party, called the attention of the jury to certain parts of the testimony as proper to be considered by them in determining their verdict, the judgment will not be reversed because the court, at the request of the other party (who obtained the verdict), afterwards called the attention of the jury to certain other parts of the testimony in similar terms; but such mode of calling the attention of the jury, at the request of either party, to particular circumstances in proof is improper.

"On an issue whether a conveyance was made to hinder, delay, or defraud creditors, it was held not proper to instruct the jury that 'the payment of a valuable and adequate consideration for the land is a circumstance that the jury should consider in determining the good faith and fair dealing of the purchaser;' but such instruction was held not to be good ground for reversal, where the court, in another charge previously given, had clearly and distinctly presented the true questions for the jury to decide, and the evidence upon which they must decide, in

³² *Sikes v. Baer*, 8 Clarke (Iowa) 368.

proper application to the facts of the case,—the whole charge not being unfavorable to appellant.

“In like manner, the following case was held to have been improper; but, for like cause, the court refused to reverse the judgment ‘that the defendant’s (purchaser’s) causing an investigation to be made as to the right of the defendant’s vendors to convey a good title, is another circumstance for the jury to consider in determining the good faith and fair dealing of the defendant in the transaction.’”³³

§ 605. In an action on a promissory note given for a mowing-machine, which it was claimed was warranted, it is erroneous to instruct that, “if the jury believe the contract was rescinded, or the warranty of the machine broken, defendants would be entitled to recover whatever amount they may have paid on the purchase;” because the defect may have been unimportant, or the machine, notwithstanding, have been beneficial to the defendants.³⁴

§ 606. In an action for disturbance to a right of way claimed by prescription, it was held proper to refuse an instruction, that if the party using the way asked permission to do so once within the twenty years, or if the owners of the land, over which it passed, objected to or forbade such use once within that time, it would defeat the right of way, if the judge has already instructed the jury that the plaintiff must prove an adverse use for twenty years, and that adverse use meant using the way as of right without asking permission of any one, and not by

³³ Wood v. Chambers, 20 Tex. 247.

³⁴ Morgan v. Collins, 19 Ill. 126.

permission, and if the jury, in reply to a question submitted to them, find that the right of way was acquired by twenty years' use before any objection was made.³⁵

§ 607. In an action by the heirs of a grantor against the grantee, to recover possession of the land for breach of the condition on which the conveyance was made, the declarations of the grantor showing a performance of the condition are admissible. And so, where a deed was based on the condition of the support and maintenance of the grantor and his wife, it was held, in such an action, that it was not error to charge, that if the grantor had expressed himself satisfied with the manner in which he was treated by the grantee, it was to that extent a waiver of a strict performance, and that the charge must be taken as confined to the time when the admissions were made, and not as embracing a subsequent period. And in forfeiture under the condition, the jury may properly be left to determine whether the grantee intended in good faith to perform, and had substantially performed, the condition of the deed, and that a substantial compliance with the contract would save the forfeiture.³⁶

§ 608. In an action of ejectment, concerning land on both sides of a river, it was held error to refuse an instruction, that "if the jury found from the evidence that the plaintiff had shown a right only to that portion of the land on one side of the river, he was not entitled to recover with regard to the portion on the

³⁵ Howard v. O'Neill, 2 Allen, 210.

³⁶ Spaulding v. Hallenbeck, 39 Barb. 80.

other side.”³⁷ It is the duty of the court, also, to explain what is meant by adverse possession.³⁸

§ 609. Where a note was given for two town lots, and an action brought thereon, and the issues were, whether the land claim had been abandoned, and whether the note was without consideration, the instruction was refused, that, “under the pleadings in this action, it must appear satisfactorily that the defendant demanded a conveyance of the lots, or the plea of want of consideration does not apply;” and the refusal was held not error.³⁹

§ 610. Where a court virtually charged the jury, that the brand U. S. on a horse was a sufficient proof that the horse belonged to the government, it was held error, although the fact of the brand was a circumstance to be considered.⁴⁰

§ 611. As to the discharge of a surety, this instruction was held erroneous: “If the jury believe from the evidence that A signed the note as security, and if they further believe that indulgence was given to the company by the plaintiff without the knowledge or consent of the security, the security is discharged” — because the plaintiff should know that A signed as security.⁴¹

§ 612. Where, in an action for nuisance, an instruction was given to the effect that the degree of comfort to which plaintiff was entitled, was that ordinarily enjoyed by other persons in the neighborhood other-

³⁷ *Van Vleet v. Olin*, 4 Nev. 95.

⁴⁰ *Plummer v. Newdigate*, 1

³⁸ *Lockhart v. Luker*, 36 Miss.

Duvall (Ky.) 1.

68.

⁴¹ *Howell v. Manuf. Co.* 31

³⁹ *McClane v. Thomas*, 1 Oregon, 289.

Ga. 665.

wise similarly situated, and that the acts of the defendant preventing this would constitute a nuisance, held, that if intended to caution the jury to adopt the ordinary standard of comfort and convenience, to regard the notions of comfort and convenience entertained by persons generally of ordinary tastes and susceptibilities, the remarks might be correct; but that, as they may have led the jury into a mere comparison of the situation of the plaintiff with that of his neighbors, — into an inquiry simply whether any difference was perceptible, and from the real question whether the consequences resulting from the acts of the defendant, — the difference of enjoyment, if any were found to exist, constituted an actual damage, they were calculated to mislead the jury.⁴²

§ 613. In an action by the indorsee of a promissory note against the maker and indorser, an instruction was given, that "if the jury found the indorser was released by want of notice of non-payment, still, if they also found that he subsequently promised to pay the note, he could be held liable;" and afterwards it was contended in the Supreme Court, that the qualification ought to have been added, that such promise, in order to bind the indorser, must have been made with the knowledge that he had been released, and nothing in the record showed that at the trial any such qualification had been requested, it was held, that while the instruction might have more fully stated the law with the qualification, yet that, giving the word "promise" its proper legal signification, there was no reasonable probability that the jury was

⁴² Gas Co. v. Freeland, 12 Ohio State, 392.

misled by the instruction to the prejudice of the appellant; and that the party, having failed to ask for the qualification in the court below, was not entitled to complain.⁴³

§ 614. In an action for a breach of promise, the attorneys for the plaintiff were improperly allowed to argue to the jury, that the fact of the defendant's having moved and obtained a change of venue was a circumstance against him, and thereupon the defendant asked an instruction that the fact could not properly be considered prejudicial, which the court refused. The refusal was held error.

And in the same case, the pleas were the general issue and minority when the promise was made, and the replication was a ratification after coming of age. An instruction was asked by the defendant, that "if the jury believe that the defendant was under age at the time the plaintiff assumes the contract was made, to find the defendant guilty they must find that the contract was made by him while he was under age, or they have no inquiries to make as to what he may have said or done, after he came of age, that may look like a confirmation or ratification of the contract; for there is none in that case to ratify." It was held properly refused.⁴⁴

⁴³ *Ault v. Sloan*, 4 Clarke (Iowa) 508.

⁴⁴ *Conaway v. Shelton*, 3 Ind. 336.

PART III.

BILLS OF EXCEPTION.

CHAPTER I.

OFFICE OF BILLS OF EXCEPTION.

§ 615. THE especial purpose of a bill of exception is to introduce into the record that which does not otherwise appear therein, and which it is necessary to bring to the notice of the court to which appeal is made. A Supreme Court will not generally review the judgment of the court below, unless error appears of record, or exceptions are taken and preserved;¹ although, in some states, by statute, there is a co-ordinate means adopted, which, without superseding bills of exception, will yet bring matters into the record; as where, as in Pennsylvania, the judge who delivers an opinion or a charge may, at the request of either party, "reduce it to writing, with the reasons therefor, and file the same as of record in the cause;" and where this is done a bill of exceptions is, of course, needless.

¹ *Wenst v. Schroeder*, 40 Mo. 602 ; *People v. Martin*, 32 Cal. 91.

§ 616. As it is the office of a bill to bring in matters *in pais*, process, pleadings, orders, judgments, &c., must appear by the record, and cannot be proved by a bill,² which is founded on some objection, in point of law, as to the opinion of the court, the competency of witnesses, the admissibility or legal effect of evidence, or some matter of law, on facts not denied, on which either party is overruled by the court.³ It may apply to any decision on matter of law, from the commencement to the close of the trial.⁴ But it is a fundamental rule that it must be taken on facts which are undisputed; because the question or point of law, to the decision of which an exception lies, does not arise until the facts are determined.⁴

§ 617. To effect the purpose indicated, no very rigid rules of form have been established,⁵ although, indeed, there are certain indispensable characteristics to be hereafter noticed in regard to their preparation, which, however, are not formal, but substantial merely.

§ 618. With legitimate matters of record it is not the office of a bill of exceptions to intermeddle, and so matters of record which only appear in the bill will not be noticed by the appellate court. No part of the function of a bill is to amend the records, in any case whatever;⁶ but only to embody matters not otherwise properly appearing on the record. Thus, where an exception to the judgment of a court may

² *Jameson v. Moon*, 43 Miss. 598.

³ *Wheeler v. Winn*, 53 Pa. St. 122.

⁴ *Will of Bowen*, 34 Cal. 682.

⁵ *City of Leavenworth v. Mills*, 6 Kan. 299.

⁶ *Porter v. Porter*, 41 Miss. 116.

be certified in a bill, the judgment itself cannot be, this being a part of the record proper.⁷ And the evidence, not being of record, must be preserved by bill.⁸ If the bill be so loosely drawn as to leave matters in doubt, the proceedings thereon below will, in general, be affirmed.⁹ And, on the other hand, where the bill sets out a judgment, and the record does not certify it, the bill cannot be noticed thereon, since it cannot cure the record defect.¹⁰

§ 619. Nor is it the office of a bill to bring up the whole case for re-examination on the general merits thereof, but only for review as to the legal correctness of the proceedings excepted to.¹¹ As, where a bill of exceptions was declared by the Supreme Court to be nothing but a recapitulation of the whole evidence, to induce the court to determine whether, upon the whole, the court below was not mistaken in its conclusions, it was animadverted upon in this language: "This way of presenting questions of law for review has been repeatedly reprov'd by this court."¹² Where an action was brought on a book account, to which the general issue was pleaded, on which verdict was found for the defendant, it was held that the case could not be brought up for revision by a bill and writ of error;¹³ and, in a case where the defendant below stated all the facts found by the court, detailing them at length, and concluded with the declaration that, upon

⁷ *Byrne v. Cummings*, 41 Miss. 195.

⁸ *Covington v. Arvington*, 32 Miss. 144.

⁹ *Phillips on Ev.* p. 790.

¹⁰ *Moody v. Nichol*, 26 Miss. 109.

¹¹ *Miller v. Goddard*, 34 Me. 106.

¹² *Lyme v. East Haddam*, 14 Conn. 398.

¹³ *Shelton v. Hoadley*, 15 Conn. 535.

such facts and evidence, the court found the issue in favor of the plaintiff, it was held that this was an attempt to bring up the whole case for re-examination, and not to be tolerated.¹⁴ Only the specific points objected to should be brought to the notice of the court,¹⁵ in which the party was overruled;¹⁶ and in an early case in New York, the court quaintly said that the party excepting must lay his finger on those points which might arise, either in admitting or denying evidence, or in matter of law arising from a fact not denied, in which either party was overruled by the court.¹⁷

§ 620. As a bill of exceptions will not be allowed to usurp the place of a regular record, so neither will a record be allowed to include what does not regularly belong to it, and thus supersede a bill; and if matters are thus presented, they will not be acted upon by the appellate court.¹⁸ And hence, in regard to these matters, parties can never resort to entries made by a clerk of the court; as, for example, a memorandum that certain questions were asked and not allowed by the court, and exceptions taken;¹⁹ or instructions copied into the transcript,²⁰ though copied in connection with the reasons for a new trial;²¹ or a

¹⁴ *Sharp v. Curtiss*, 15 Conn. 526.

¹⁵ *Hockler's Heirs v. Cabel*, Walker (Miss.) 92; *Watson v. Watson*, 10 Conn. 75, 1 Green (N. J.) 216; *Law v. Merrills*, 6 Wend. (N. Y.) 275.

¹⁶ *Jackson v. Cadwell*, 1 Cowen (N. Y.) 639.

¹⁷ *Frier v. Jackson*, 8 Johns.

507; *Van Gerden v. Jackson*, 5 Johns. 467.

¹⁸ *Foot v. Sabin*, 19 Johns. (N. Y.) 156.

¹⁹ *Robinson v. L'Engle*, 13 Fla. 482.

²⁰ *Etter v. Armstrong*, 46 Ind. 202.

²¹ *R. R. v. Graham*, *ibid.* 240.

ruling suppressing depositions;²² or affidavits in support of a motion to set aside a default;²³ or annexing documents to transcript, even with the consent of parties in writing;²⁴ or the minutes of the proceedings of the court, signed by the judge, from day to day.²⁵ It is only, in general, where a question decided is presented by the pleadings, that a bill of exceptions can be dispensed with.²⁶

§ 621. And still less can the court go outside of a bill of exceptions, in general, to decide upon extraneous matters. The only appearance of variation to this rule is in an early case (1810), in Pennsylvania, where it was held that a plaintiff in error might assign error in an opinion on any matter material to the issue appearing on the bill of exceptions, although it was not particularized in stating the exceptions;²⁷ and one in Virginia (1809), where it was held that the court would look at the whole record, and reverse a judgment for any error apparent, although the court may have decided rightly on the particular point to which exception was taken.²⁸ These cases, however, did not go the length of holding that a court might leave the record and decide on extraneous matters, neither appearing on the regular record, nor brought to notice by a bill. The general rule is, that the court is confined to the bill of exceptions, and will not go

²² *Tragden v. Deckard*, 45 Ind. 572.

²³ *Horn v. New*, 63 Ill. 539.

²⁴ *Burdick v. Hunt*, 43 Ind. 381.

²⁵ *Haraszthy v. Horton*, 46 Cal. 545.

²⁶ *Pecquet v. Pecquet's Ex-ec'r*, 17 La. An. 204.

²⁷ *Ins. Co. v. Pratt*, 2 Binney, 323.

²⁸ *Murdock v. Herndon's Ex-ec'r*, 4 H. & M. (Va.) 200.

beyond it in such matters as it appropriately brings up for review, although it has been held, in Illinois, that an entry upon a motion to dismiss a suit may be so made as to supersede the necessity of a bill.²⁹

§ 622. Thus the Supreme Court of the United States, in *Hinde's Lessee v. Longworth*,³⁰ said, "It may well be questioned whether, when the purpose for which the evidence is offered is specifically avowed, the court will look at it in any other point of view, or inquire whether it might not be proper for some other purpose. As a general rule, we think the party ought to be confined, in examining the admissibility of evidence, to the specific objection taken to it. The attention of the court is called to the testimony in that point of view only, and to admit an inquiry afterwards whether the evidence might not have been admissible for some other purpose, would be sanctioning a course of practice calculated to mislead." And in a previous case (1812) the court remarked, "Each bill of exceptions must be considered as presenting a distinct substantive case; and it is on the evidence, stated in itself alone that the court is to decide. We cannot go beyond it and collect other facts which must have been in the mind of the party, and the insertion of which in this bill of exceptions could alone have sanctioned the opinion as prayed for."³¹ And the Supreme Court of Maine declares, "No question which is not presented by the bill of exceptions is open for consideration."³² And that, where the special findings of a

²⁹ *Randolph v. Emerick*, 13 Ill. 344.

³⁰ 11 Wheat. 209.

³¹ *Dunlap v. Monroe*, 7 Cranch, 270.

³² *White v. Jordan*, 27 Me. 378.

jury can have no effect but to raise a question of jurisdiction, which question is not made a part of the bill, the exceptions will be overruled.³³ And in New York, "Although all the evidence given at the trial may be contained in the bill, the court cannot take notice of any matter that is not specifically stated as a ground of exception."³⁴ And so, in that state, where a non-suited plaintiff brings error thereon upon a bill of exceptions, the court will not, on the suggestion of the defendant in error, examine into the correctness of other decisions made by the court below to sustain the judgment, the only questions arising being such as the bill sets forth.³⁵ The Supreme Judicial Court of Massachusetts observes, "If it [the rule] were not observed, it would be to make this the court of original, instead of appellate jurisdiction."³⁶ And where there is a general verdict of guilty, "We are therefore to presume that all the facts were proved, necessary to sustain that verdict, and nothing comes before this court but questions of law. . . . Bills of exception are not to be deemed a general report of the case, and are not considered to embrace any more of the facts proved than are necessary to raise the points of law relied upon. To any other part of the case, the attention of the judge who allows the exceptions is not called."³⁷ In New Jersey, "It is not competent for a plaintiff in error to draw into question, on a bill of exceptions, points not raised or objected to below.

³³ *State v. Hineckley*, 38 Me. 25.³⁶ *Spaulding v. Alford*, 1 Pick.³⁴ *Whiteside v. Jackson*, 1 Wend. 420.

37.

³⁷ *Commonwealth v. Stephens*,³⁵ *Dean v. Gridley*, 10 Wend. 14 Pick. 371.

Every motive of policy and convenience forbids. So does the nature of the proceeding.”³⁸ Again, “If the Sessions had any legal evidence, we never inquire into the right of it, but take it as they did. We do not allow them to settle the law for us, but we never dispute the facts they find, nor weigh the circumstances over again on *certiorari*.”³⁹ In Virginia, where exceptions are taken on specific points, none will be examined but such as were presented to, and decided by, the court below; although, from the matters stated in the bill, there are apparently other points which might have been raised.⁴⁰ So, in Vermont, it is said, “If any question is to be made as to the competency of testimony, the auditor must be requested to report the facts necessary to raise the question; if he refuse, the county court will hear affidavits. But this court can never review their decision, except as to questions of law arising on the report and bill of exceptions.”⁴¹ Thus, in Connecticut, where, in an action for taking property of plaintiff, the plea was justification under a tax-warrant, which was admitted in evidence, the plaintiff on various grounds objecting, but not on the ground that there was no rate-bill annexed, a bill of exceptions set out the warrant, unaccompanied by any rate-bill, and it was held that the want of the rate-bill could not be assigned as error.⁴² In Kentucky, it was said, “In reviewing the decision

³⁸ Allen v. Smith, 7 Halst. 168.

³⁹ Kingwood v. Bethlehem, 1 Green, 229.

⁴⁰ Newsum v. Newsum, 1 Leigh, 86.

⁴¹ Putnam v. Dutton, 8 Vt. 399.

⁴² Pickett v. Allen, 10 Conn 147.

of the court upon the plea of *nul tiel record*, we are not at liberty to travel out of the record before us, or presume that such a record as that recited in the *scire facias* was not produced in evidence to the court. Without being made so by bill of exceptions, the record alluded to in the *scire facias* forms no part of the record.”⁴³ And even consent of parties will not give the court authority to look beyond the record.⁴⁴ And a bill must not be loaded with extraneous matter, beyond what is essential to present the point of law.⁴⁵

§ 623. It is not a part of the office of a bill of exceptions to serve as a *supersedeas* in the case, of itself. Formerly it was so in New York, at least measurably.⁴⁶ But it is not so now; and if the party presenting the bill desires to stay the proceedings of his adversary, he must obtain an order to that effect.⁴⁷ And where an order granting time to prepare a bill provided for a stay of proceedings, and, before the expiration of the time, another order was made extending the time, but saying nothing about a stay of proceedings, it was held that the stay was limited to the time allowed in the first order.⁴⁸ And formerly, in Georgia, where bond was given or affidavit filed.⁴⁹

§ 624. Since it is no part of the office of a bill of

⁴³ *Fowler v. Commonwealth*, 4 Mon. 129.

⁴⁴ *Preble v. Reed*, 5 Shep. (Me.) 172.

⁴⁵ *Ex parte Jones*, 8 Cowen (N. Y.) 124.

⁴⁶ *Moran v. Dawes*, 4 Cowen, 22; *Roosevelt v. Heirs*, 7 Cowen, 107; *Jackson v. Varick*, *ibid.* 412.

⁴⁷ *Seymour v. Slocum*, 18 Wend. 509.

⁴⁸ *Goodrich v. Downs*, 5 Hill, 511.

⁴⁹ *Doe ex dem. v. Peeples*, 1 Kelly. But see, *contra*, 34 Ga. 101, 105, and 19 Ga. 590, where held that a party is not even entitled to a *supersedeas* until the actual filing of bill.

exceptions to bring up facts for controversy, it must, of necessity, import absolute verity, so that, when it is signed and sealed, the truth of it cannot be controverted,⁵⁰ not even where counsel, in their petition, say that it is not correct, and was not seen by them before it was signed.⁵¹ And where it is disputed as to how a witness testified, and the opposite party affirms that the witness did not testify as stated in the bill, it is held that the bill is conclusive on the matter.⁵²

§ 625. And accordingly a bill is so conclusive in its verity, that it is generally held that it will even control the record itself, where there is a discrepancy or contradiction between them, as to the subjects within the province of the bill; as where there is a conflict between the judgment entry and the bill,⁵³ or where a bill is taken at one term to an order entering judgment *nunc pro tunc*, sustaining demurrers to pleas after argument at a former term, but there was no entry of record, and the bill recites the fact of the motion to enter judgment *nunc pro tunc*, and its allowance and entry of judgment accordingly, and the exception taken thereto, while the record contains an entry of judgment sustaining the demurrers at the term when the demurrers were actually sustained, the bill will prevail over the entry of the record, and be regarded as containing the true account.⁵⁴ It is otherwise in Iowa. (1 Iowa, Greene, 56.)

⁵⁰ Wheeler v. Winn, 53 Pa. St. 126.

⁵¹ Ryan v. Burkam, 42 Ind. 525.

⁵² Law v. Merrills, 6 Wend. 276.

⁵³ Vincent v. Rogers, 30 Ala. 471; Davidson v. Street, 34 Ala. 125.

⁵⁴ Rhodes v. Sherrod, 8 S. & M. (Miss.) 97.

§ 626. In error, bills are only brought before the court by a writ of error. And in a case in New York, in 1805, where counsel attempted to bring on an argument on a bill of exceptions, although no writ of error was sued out, the court responded in a decision almost as terse and laconic as Cæsar's celebrated *veni, vidi, vici*. Said they, "Take back your cases. There is no *lis pendens*."⁵⁵ Yet there seems no good reason why parties may not enter a voluntary appearance, and bring up the record, as service may be waived in a court below.

§ 627. The office of a bill of exceptions is confined strictly to the suit to which it belongs. Separate suits cannot be blended, unless the parties are the same.⁵⁶ Nor can a bill be introduced into another suit as evidence.⁵⁷ Nor, where a bill of exceptions has been taken, and then a new trial granted, on which the same points again occur, can the bill be used to bring up the proceedings of the new trial before the Supreme Court. In such case, the exceptions must be taken the second time.⁵⁸

In Maryland, it has been held that separate bills, even in the same case, are to be treated as distinct and independent, unless they establish a connection by referring one to another.⁵⁹ Where there are such references, the whole series will be regarded as one;⁶⁰

⁵⁵ *Bradt v. Gray*, 3 Caines, 170.

⁵⁶ *Mayberry v. Morse, &c.*, 39 Me. 105; *Codman v. Strout, &c.* 9 Shep. (Me.) 292.

⁵⁷ *Shotwell v. Hamblin*, 23 Miss. 156.

⁵⁸ *Harmison v. Clark*, 1 Scam. (Ill.) 131.

⁵⁹ *Gist's Adm'r v. Cockey*, 7 Han. & Johns. 141.

⁶⁰ *Doe ex dem. v. Gildart*, 5 How. (Miss.) 606.

as, for example, referring to the charge contained in another bill,⁶¹ or a bill stating objections to the admission of certain evidence, "on the grounds and reasons set out in the third instruction asked," which instruction was embodied in another bill.⁶² But the better way is to embody the whole in one bill. (*Lindsay v. Henderson*, 27 Miss. 502.)

§ 628. But a bill cannot thus, by reference, make other papers a part of itself. The Supreme Court of Wisconsin remarked in a certain case that "the practice of sending up loose papers, and treating them as a part of the bill of exceptions, without stipulations to cure the defect, is becoming quite too common, and cannot be approved by the court, even if counsel take no objection to it."⁶³ But an express stipulation is held by that court to be sufficient to extend a bill over papers not actually incorporated in it.⁶⁴

Where a bill refers to transcripts of the record which are not certified with the record as a part of it, although attached to the transcript, they will not be considered by the court.⁶⁵ And where documents were alluded to as used on the trial below, it was remarked, on error, that the "court cannot in this way be put upon a search after such papers. They should be made a part of the exceptions, if they are its necessary concomitants; otherwise they should not be alluded to."⁶⁶

⁶¹ *St. Johnsbury v. Waterford*, 15 Vt. 692.

⁶² *Spencer v. Pilcher*, 8 Leigh. (Va.) 566.

⁶³ *Orton v Noonan*, 19 Wis. 356.

⁶⁴ *Martin v. Improvement Co.* *ibid.* 552.

⁶⁵ *Quigley v. Campbell*, 12 Ala. 58.

⁶⁶ *Wyman v. Wood*, 25 Me. 438; also 7 S. & M. (Miss.) 530.

It seems, however, in Illinois, a reference will answer, if the papers are so specifically referred to by the bill as to leave no reasonable doubt of the identity thereof, and that the party intends to rely upon them in support of his case.⁶⁷

It is not sufficient that places are pointed out in the bill for the insertion of documents indicated by the words "Here insert." If the bill does not contain them, they will not be noticed.⁶⁸

Where a clerk states merely that certain papers were read in evidence, this does not bring them into the record;⁶⁹ nor where a clerk transcribed certain records intended to be embraced in the bill of exceptions, and stated that they "were the records and executions referred to in the bill of exceptions."⁷⁰ And where a reference to deeds and instruments was by means of letters of the alphabet, the court thereon remarked, "We must premise, in this case, that the bill of exceptions is very defective. It refers to certain instruments introduced on the trial, designating them as being marked by certain letters of the alphabet, but the instruments are not incorporated in the bill of exceptions. Certain instruments of a like description have been inserted in the record; but whether they are the same used on the trial, we cannot know, as they are not communicated to this court through the proper medium. We should, therefore,

⁶⁷ *Hatch v. Potter*, 2 Gil. 727.

⁶⁸ *Berry v. Hale*, 1 How. (Miss.) 318.

⁶⁹ *Carmichael v. Brown's Adm'rs*, 4 How. (Miss.) 431

⁷⁰ *Maulding v. Rigby*, 4 How. (Miss.) 222.

feel much reluctance in reversing the judgments were the errors ever so glaring.”⁷¹

And so it behooves the party excepting to see to it that copies of all papers referred to in the bill are actually appended thereto before appearing in the appellate court.⁷²

And thus evidence cannot be made part of a bill by reference to the lines of the transcript, where it may be found,⁷³ or page of the record.⁷⁴

§ 629. There is a singular exception in California, where it is held, that, in the absence of a bill of exceptions or agreed statement of facts, the evidence taken on motion of a party by the clerk in writing may be certified in a transcript, and will thus serve as a substitute for a bill.⁷⁵

§ 630. A made “case” will not answer instead of a bill, and fulfil the office thereof in the United States courts, but it must be actually turned into a bill. And so, where, in a very important case, a verdict was given for the plaintiff, subject to the opinion of the court on a case to be made containing the questions of law and a reservation of the right to either party, after the court should decide thereon, to turn the case into a bill of exceptions, and a motion for a new trial and judgment entered for the plaintiff, the defendant sued out a writ of error. Inadvertently the case was annexed to the record without changing it into a bill; and neither party observing the omission, the case was

⁷¹ *Pickett v. Doe*, 5 S. & M. (Miss.) 486.

⁷² *Frost v. Bates*, 16 Vt. 145.

⁷³ *R. R. v. Griffin*, 45 Ind. 369.

⁷⁴ *Hopkins v. Turnpike Co.* 46 Ind. 188.

⁷⁵ *Ingraham v. Gildermester*, 2 Cal. 161.

argued in the Supreme Court on the merits. The court noticed the defect, however, and affirmed the judgment below on that ground. Afterwards, inasmuch as it was the result of inadvertence, the Circuit Court of the United States allowed the defendant to turn the case into a bill of exceptions on payment of the costs in the Supreme Court.⁷⁶ Exceptions before a referee, in New York, to his decisions, which exceptions appear in a case made for the purpose of obtaining a new trial, do not constitute a bill of exceptions.⁷⁷ And it is imperative that a case be turned into a bill before the Court of Appeals will entertain it.⁷⁸ In the Superior Court of the city of New York, it is held, that where exceptions are taken in good faith, with a view of insisting on them at bar, and, if necessary, in an appellate court, leave will be given to turn a case into a bill of exceptions, although the case, as prepared, omitted to provide such leave.⁷⁹ Nevertheless, it seems that, in the Supreme Court, it is not a matter of course to allow a party to turn a case into a bill, although, while the Supreme Court will act finally on the case itself, the Court of Appeals will only act on it when turned into a bill. It is held dependent on the questions involved and the importance of the case; and so, where a case was judged not of importance enough to go to the Court of Appeals, leave was denied.⁸⁰ But this looks like a very uncertain standard of discretion. Previously, however, it

⁷⁶ *Williamson v. Suydam*, 4 Blatch. (C. C.) 323

⁷⁹ *Oakley v. Aspinwall*, 1 Sand. 694.

⁷⁷ *Allen v. Way*, 7 Barb. 585.

⁸⁰ *Clark v. Brown*, 1 Barb.

⁷⁸ *Livingston v. Radcliff*, 2 Conn. 189.

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was held that a Circuit Court had no right to refuse a party the right to make a case subject to be turned into a bill, although, where both a case and bill were brought to the Supreme Court, the party was made to elect which he would argue.⁸¹ The rule is thus stated as to the Supreme Court and Court of Errors: "If the parties are content to abide by the decision of the Supreme Court, they repose themselves upon the case agreed upon between them. But if they contemplate ulterior measures in given events for the review of the judgment, they resume the right to turn the case into a bill of exceptions or special verdict, to enable them to bring the questions to this court for revision."⁸² And if difficulties occur in turning the case thus, it is intimated that a party is entitled to the aid of the court, to which the jurisdiction belongs, in removing them.⁸³

§ 631. It is held that, in a criminal case in New York, the right to a bill of exceptions is purely statutory, and its office is to bring up for review questions of law decided on the trial and confined to the main issue, not extending to preliminary or collateral questions, such as challenges to the array, motions to quash the indictment for irregularity, &c.⁸⁴

§ 632. In Massachusetts, a bill of exceptions suspends the right of appeal on the ground that it is a substitute for an appeal, or rather a peculiar mode of it, and inconsistent with the right of appeal in the common form.⁸⁵

⁸¹ *Root v. King*, 8 Cowen, 125.

⁸² *Seward v. Jackson*, 8 Cowen, 411.

⁸³ *Law v. Jackson*, *ibid.* 750.

⁸⁴ *Wynhamer v. People*, 20 Barb. 567.

⁸⁵ *Sale v. Pratt*, 19 Pick. 194

CHAPTER II.

THE RIGHT OF EXCEPTING, AND WAIVER THEREOF.

§ 633. THE right of excepting is confined to the parties on the record. And in a road case, where two towns not parties to the proceedings below filed exceptions in the appellate court, that court remarked, "The inhabitants of St. Albans and of Cambridge did not litigate the subject-matter of this petition before the county commissioners. They were neither 'parties, petitioners, nor respondents' in that court. They entered no appearance. They neither appealed, nor had a right to appeal, from any decision the county commissioners made or might have made. They made themselves in no event liable for costs. Their names are not upon the docket of this court as parties. From aught that appears, any other town in the county might with equal propriety have contested the acceptance of this report, and are equally parties to the record. It would be an anomaly in judicial proceedings to permit mere strangers, not parties, either as petitioners or respondents, not privies in interest to any party, who have not entered their appearance, and who have not become amenable to the jurisdiction of the court, into the contests of others at their own will and pleasure. The inhabitants of St. Albans and of Cambridge are in no condition to interfere with the disposition of this appeal, or to except to any ruling or decision of the justice presiding."

But, still more singularly, the commissioners themselves did the same thing, their decision having been reversed by a committee appointed by the Supreme Court. And, on their appearance to sustain their decision, the court remarked, "The county commissioners are public agents, whose duties are clearly set forth and defined. This is an appeal from their decision. They were no parties to the petition when pending before them; they could not enter an appearance in their own court, or become before themselves either petitioners or respondents. In adjudicating upon the petition they acted judicially. When the appeal was taken, the ultimate decision of the matter was withdrawn from their jurisdiction. It is no part of their duty to pursue appellants from their court, and to litigate in this with parties dissatisfied with, and contesting the propriety of, their adjudications at the public charge, or to except to the decisions of any justice of this court in accepting a report of its committee by which their proceedings have been reversed."¹

§ 634. On a like principle, where an attorney is improperly excluded from conducting a trial below, and excepts for himself to the ruling, the exception will avail nothing for his client in any way.²

§ 635. In Alabama, it is held that an appellee will not be allowed, even with the consent of the appellant, to make cross assignments of error, unless he reserved a bill of exceptions to the rulings of the court below; and it is not sufficient that his exceptions are stated

¹ Selectmen of Ripley, 39 Me. 351.

² Rosenbaum v. McThomas, 34 Ind. 333.

in the appellant's bill.³ But in Tennessee the rule is the reverse of this.⁴ And so, in Kentucky, where both parties objected to an instruction below, but only one of them brought up a bill, and contended that the other had no right to assign errors thereon, the court held that the other had such right.⁵ And, in Massachusetts, if an entry be made by one filing exceptions, it is sufficient for both.⁶ Where both parties filed exceptions, and the plaintiff prevailed on the defendant's exceptions and waived his own, the defendant was not allowed costs upon the plaintiff's exceptions.⁷

§ 636. In criminal cases only the defendant can file exceptions.⁸

§ 637. As to waiver expressly made, it is held that, where, on the overruling of a motion for a new trial, and time given to file a bill of exceptions, one of the parties making the motion causes an entry to be made of record that he withdraws the motion, and waives leave to file a bill of exceptions, he cannot, on appeal, assign error on the overruling of the motion, or present any question reserved by a bill of exceptions taken by a co-defendant.⁹

§ 638. There are various forms of implied waiver, usually not intended by the party, where it is strictly implied. For example, if a party grounds an excep-

³ *Leslie v. Langham's Ex'rs*, 40 Ala. 524.

⁴ *Williams v. Bowdon*, 1 Swann, 286.

⁵ *Turner v. Patterson*, 5 Dana, 292.

⁶ *Shattuck v. Woods*, 1 Pick. 176 (n.).

⁷ *Dewey v. Humphrey*, 5 Pick. 187.

⁸ *Commonwealth v. Cummings*, 5 Cush. (Mass.) 212; *State v. Hand*, 1 Eug. (Ark.) 169; *People v. Royal*, 1 Scam. (Ill.) 557.

⁹ *Makepeace v. Davis*, 27 Ind. 352.

tion on a deficiency of evidence on the part of his adversary, which is well founded, and yet erroneously overruled, and he afterwards proceeds and supplies the deficiency by evidence produced by himself, he waives or overrules his own exception.¹⁰ So, where a court erroneously ruled that the plaintiff's witness could not testify unless the plaintiff (administrator) should elect to do so, and he excepts to the ruling, but afterwards does testify, the ground of the exception was removed.¹¹ And so, in a prosecution under a penal statute, where the prosecution abandons a count, so as to render a question excepted to wholly nugatory, the abandonment takes away the right of exception.¹²

§ 639. The most usual waiver is by a motion for a new trial. This is held, in the United States courts, to be a waiver, even if exceptions are taken and signed. Says Mr. Story, "The motion of a new trial cannot be entertained according to the practice of the court, unless the bill of exceptions is waived. The party has his election either to proceed on the writ of error to the Supreme Court, in order to have it determined there whether the points were correctly ruled at the trial, or, waiving that remedy, to apply here for a new trial. But he cannot be permitted to proceed both ways."¹³ And more especially by an acceptance of a new trial granted on the motion of the acceptor in the court below. It is thus explained by the Su-

¹⁰ *Prescott v. Hayes*, 43 N. H. 598.

¹¹ *Reed v. Spaulding*, 42 N.H. 114.

¹² *Commonwealth v. Lincoln*, 9 Gray, 288.

¹³ *Cunningham v. Bell*, 5 Mason (C. C.) 161.

preme Court of Massachusetts: "The exceptions taken by the defendants at the first trial of this case were waived and abandoned by their acceptance of the new trial which was granted on their motion. This is the necessary result of the order of the court setting aside the verdict. The exceptions to the rulings on which the verdict was founded fell with it. In truth, exceptions are in effect nothing more than a motion for a new trial on the ground of error in law, the only difference between the two being that the latter is addressed to the discretion of the court before which the case was tried, while the former lie as a matter of right to the court for the correction of errors. But in either case, only one of two results can be obtained. The court must either set aside or affirm the verdict. If the defendants should now be permitted to go on and prosecute their exceptions taken at the first trial, they would gain no practical advantage thereby. If successful in maintaining them, this court could pass no effectual order, and render no judgment in reversing the rulings. The verdict having been set aside, there is nothing left on which an order sustaining the exceptions can operate. Nor is this all. Not only has the first verdict been set aside absolutely, but a new verdict has been since obtained against the defendants, founded on a different state of facts, and involving different principles of law. That will still remain after the previous exceptions shall have been disposed of, and it is the only verdict that now stands against the defendants; so that the points raised at the first trial, and embraced in the exceptions, are only moot questions, and do not

in any way affect the present disposition of the case, which must depend on the correctness of the rulings under which the last verdict was rendered.”¹⁴

§ 640. Before the commencement of his argument, a defendant offered the court a written request for an instruction. During the argument, the judge announced that he would charge as requested, with one qualification; to which qualification the defendant replied that he would not except. But, on delivering the charge, the defendant did except to the qualification: whereon the judge requested him to point out the difference between the oral statement of the qualification, to which he had assented, and the subsequent written statement, and suggested that thereon the court might revise the phraseology, but he declined to suggest any change. It was held that this refusal of the defendant to point out the alleged variance was a waiver of any right of exception.¹⁵

§ 641. A plaintiff may take a nonsuit by consent, with the liberty to move to set it aside, without losing the right to his exceptions. “This course is often adopted [in some states] when it is evident from the rulings of the court that the plaintiff cannot recover, and a motion for a nonsuit is not made by the adverse party.”¹⁶

642. In general, as we shall have occasion to notice more at large in a subsequent chapter, objections to the regularity of proceedings, or to the competency

¹⁴ *Seccomb v. Ins. Co.* 4 Allen, 154.

¹⁵ *Coleman v. R. R. Co.* 106 Mass. 160.

¹⁶ *Natoma Water, &c., Co. v. Clarkin*, 14 Cal. 549.

of a tribunal having general jurisdiction of the subject, will be considered as waived unless shown to have been taken at the earliest practicable moment after the facts on which they rest become known to the party taking them.¹⁷ Indeed, it is an inflexible rule, that even comparatively slight laches destroy the right of excepting.

643. Where assignments of error are not argued or supported by authority, they may be regarded as waived.¹⁸ But where a defendant has joined in error, that joinder does not operate as a waiver of the right to move to strike out a bill of exceptions filed out of time.¹⁹

644. Where a bill set out the evidence and exceptions to the admissibility of some portions of that evidence, and then recited an agreement between the parties on the trial discharging the jury, and providing that if, in the opinion of the court, the law upon the facts in evidence was with the plaintiff, judgment should be rendered for him, otherwise for the defendant, and finally recited the judgment in favor of plaintiff, and defendant's exceptions thereto, it was held that the agreement was a waiver of all previous objections and exceptions to the admissibility of evidence, and that, accordingly, under the agreement, the court was bound to take the facts which the evidence tended to prove as the admitted facts of the case.²⁰

¹⁷ *Gilmanton v. Hann*, 38 N. H. 108.

¹⁸ *Payne v. McClain*, 7 Ind. 139.

¹⁹ *Farrar v. Finney*, 21 Mo. 572.

²⁰ *Gibson v. Land*, 27 Ala. 118.

§ 645. Where special causes of exception are assigned, others not assigned, which do not go to the foundation of the action, will be considered waived.²¹

§ 646. In Maine, if a party in the District Court, before offering any written exceptions for signature, after verdict moves for a new trial, and procures an adjudication upon it, it is a waiver of the right to have the exceptions certified; and if they are actually certified afterwards by the judge, the appellate court will not consider them.²²

§ 647. In England, where one, who has on the trial tendered a bill of exception, brings a writ of error before it is signed, he thereby waives it, and will not be allowed to append it to the record.²³

§ 648. In Kentucky, it has been held that where objections were offered to depositions, and no exception was taken to the decision of the judge overruling the objections, the admissibility thereof will not be considered by the appellate court,²⁴ the rule herein being the same as to written and oral evidence. And this, doubtless, is the general rule.

§ 649. Where a party in Massachusetts moves for a new trial on the ground of a misdirection of the jury in a matter of law, and the motion is overruled, he cannot afterwards allege exceptions to that misdirection.²⁵ And this, too, is the general rule, although in some states, as in Arkansas, the party may set out

²¹ *Teas v. McDonald*, 13 Tex. 349.

²² *Ellis v. Warren*, 35 Me. 125.

²³ *Dillon v. Roe*, 1 Bing. 17, cited in *Meese v. Levis*, 13 Pa. St. 388.

²⁴ *Gaines v. Wiggs*, 9 Bal. lou, 282.

²⁵ *Sylvester v. Mayo*, 1 Cush.

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the evidence, and reserve his previous exceptions in a bill of exception to the decision refusing the new trial.²⁶

§ 650. Where a party takes a voluntary nonsuit, he is out of court, and cannot afterwards file a bill of exceptions.²⁷

§ 651. Where a plea is received against objection by the plaintiff, who excepts to the decision, and then takes issue in fact on the plea, it is held, in Virginia, that the taking issue does not operate as a waiver of the exception.²⁸ I suppose, however, that, in most states, such an exception would not be required, a demurrer saving itself.

§ 652. Where a plaintiff objects to the admission of evidence, and the objection is sustained by the court, whereon the plaintiff offers to withdraw his objection, and admit the evidence, but the defendant refuses to examine the witness, and excepts to the decision of the court, the exception will not be entertained, being waived by his own act.²⁹

§ 653. In New Jersey, it has been held, that, on a motion for new trial, the entire bill of exceptions need not be abandoned, but only so much as relates to the specific grounds on which the new trial is sought. The court remark on this, "The law is not that a party cannot move for a new trial on any matter contained in the bill of exception without waiving his entire bill, but only that the court will not entertain

²⁶ *Sawyers v. Lathrop*, 4 Eng. 68.

²⁷ *People ex rel. v. Browne*, 3 Gil. 87; *Lombard v. Cheever*, *ibid.* 469.

²⁸ *Campbell's Adm'x v. Montgomery*, 1 Robinson, 392.

²⁹ *Ligget v. Bank*, 7 Serg. & Rawles (Pa.) 218.

a motion for a new trial, or in arrest of judgment on any point on which a bill of exceptions has been allowed, unless the party making such motion will waive that exception. And in this court, in the case of *Ogden v. Gibbons*, the defendant was heard on a motion for a new trial on several points of law contained in the bills of exception on his waiving so much of the bills as involved the same matters; and, though a new trial was refused, he afterwards successfully prosecuted a writ of error on his remaining bills. It is, or ought to be, the object of this and of every other court of justice to get at the truth and right of the matter. If, therefore, a party has two distinct legal objections to a judgment against him, on one of which, perhaps, the opinion of this court has been previously intimated, or is supposed to be known, and on which, for that reason, the suitor wishes, if ultimately necessary, the judgment of a higher tribunal, why should this court refuse to hear him on the other point of law, unless he will consent to submit both matters definitively to our decision? Would it not look like an unwillingness to subject our opinions to the ordeal of an appellate tribunal, or like refusing to hear a party except on terms inconsistent with the pure and disinterested administration of justice?"³⁰

§ 654. While it is held, also, in Alabama, that the court ought not to grant a new trial for causes embraced in a bill of exceptions, unless the party will waive the exceptions, yet if the court does not ex-

³⁰ *Mann v. Glover*, 2 Green (N. J.) 198.

pressly require such waiver, but allows the exception, and then overrules the motion for a new trial, the appellate court will entertain the exception nevertheless.³¹

§ 655. It seems that, in Massachusetts, an exception to a ruling requiring a party to prove the execution of an instrument, cannot be sustained, if the party subsequently prove such execution.³² But this appears exceptional. And if a plaintiff excepts to the ruling of the judge, and afterwards amends his declaration, changing the form of the action and the issue to be tried, so that the ruling becomes immaterial, and the defendant prevails on the merits, the exception taken is no longer open to the plaintiff.³³

CHAPTER III.

CONSTRUCTION OF BILLS.

§ 656. ALTHOUGH the reasons are given in a bill which influenced a judge to give his decision, these reasons are not to be regarded as a part of the record, or be considered by the court. "The object of a bill of exceptions is twofold: first, it is to object to the opinion of the court on some point of law, and refers generally to the competency of witnesses, the admis-

³¹ West v. Cunningham, 9 Port. 104.

³³ Cook v. Castner, 9 Cush. 266.

³² Commonwealth v. Putnam, 4 Gray, 16.

sibility of evidence, or the legal effect of it [instructions], or the like; and, second, it is to reduce to writing, and incorporate on the record, the substance of the transaction on which the opinion of the court is founded, so that the court above, when called on to revise the decision, may be able to see and correct the errors, if any exist. And the question thereby presented is, whether the facts which induced it are sufficient to justify it.”¹

§ 657. Where a bill concludes “to which several decisions of the court the defendant excepted at the moment,” it will be taken that the exceptions were duly made.² And equivalent expressions may be as satisfactory and clear as positive averments that “the foregoing was all the testimony that was produced on the trial of this cause.”³ And where the language is, that certain “facts appeared,” it is to be taken that they were undisputed or conceded by both parties.⁴ The court will always give effect to the plain and obvious meaning of the language used,⁵ and never become supercilious or hypercritical in construing bills of exception, any more than pleadings in a cause. And so, where there is a particular expression, as that there was “no evidence of any indebtedness,” which is repugnant to other statements in the bill, it will be construed to mean that there was no positive proof of indebtedness.⁶

¹ Cox v. Garvin, 1 Eng. (Ark.) 436.

² Steamboat v. Smith, 10 Mo. 527.

⁵ Everett v. Clements, 4 Eng. 480.

⁴ Beach v. Packard, 10 Vt. 96.

⁵ Codman v. Armstrong, 28

Me. 91.

⁶ Goodgame v. Clifton, 13 Ala.

583.

But where a bill is settled several days after the trial of a cause, and states that "the plaintiff asked for the following instructions, to the giving of which the defendant excepts," the court, in Illinois, will not consider the instructions, but regard the exception to them as not having been taken at the trial.⁷

§ 658. But, in consequence of the presumption of correctness in all proceedings, a bill of exceptions, being in the nature of an impeachment of such proceedings so presumed to be correct, will be construed most strongly against the exceptor in all cases of doubtful interpretation, since all reasonable presumptions will always be indulged by an appellate court in favor of the judgment of a subordinate tribunal. And if an alternative state of facts is presented for determination in the lower court, one of which will sustain and the other reverse its judgment, it devolves upon the objector to negative by his bill of exceptions, either by positive statement, or a recital of all the evidence, the alternative which supports the judgment.⁸ And, on the same principle, if a bill itself admits of two constructions, that will be adopted which is most favorable to the regularity of the judgment.⁹ And so, where it was objected that the court charged that the plaintiff, who was only a joint owner, could recover the entire value of the property, but this did not appear in the bill of exceptions, the court would not hear the objection.¹⁰

⁷ *Dufield v. Cross*, 13 Ill. 699.

¹⁰ *Perminter v. Kelley*, 18

⁸ *Patton v. Hayter*, 15 Ala. 18. Ala. 719.

⁹ *Donnell v. Jones*, 17 Ala.

§ 659. And, on this same principle, when a bill sets out several distinct charges and refusals to charge on request, and concludes with the words "to which defendant excepted," it is held that a court will construe the conclusion to apply only to the charge and refusal contained in the paragraph immediately preceding it.¹¹ And so in regard to rulings in respect to evidence and to the rendition of judgment.¹² And so, where an interrogatory is not set out, but only the answer thereto, in the bill of exceptions, the court will presume against the exceptor that the answer was responsive to the interrogatory.¹³

In a case where insanity was set up as a defence against an indictment, the bill of exceptions recited an offer by the state to prove, by a witness who had known the prisoner two years before the commission of the alleged offence, that the prisoner was of sound mind, to which testimony the prisoner objected, and, the objection being overruled, excepted to the decision of the court thereon; and the appellate court remarked, "The bill of exceptions must be taken most strongly against the exceptor; and, without forcing the language employed, we may well suppose that the witness referred to the sanity of the prisoner, to the antecedents, to his knowledge of and acquaintance with him before the commission of the act. Had it been otherwise, the objection should have been more specific."¹⁴

And where a bill set out a request, and concluded

¹¹ *Andress v. Broughton*, 21 Ala. 200.

¹² *Sammis v. Johnson*, 22 Ala. 690.

¹³ *Furlow's Adm'r v. Merrill*, 23 Ala. 714.

¹⁴ *Powell v. State*, 25 Ala. 30.

with the words "which charge the court refused and the defendant excepted," the exception was held to apply only to the refusal to charge as asked, and that it could not be extended to charges previously given.¹⁵

§ 660. A case happened in Alabama on this wise, involving this same principle of construing a bill most strongly against the exceptor. I prefer to state it in the language of the opinion, namely: "When a bill of exceptions fairly admits of two constructions, one of which will support the ruling of the primary court, while the other will not, this court will adopt the former. The bill of exceptions must be construed most strongly against the party excepting. The bill of exceptions in this case shows that the agreement on which the defence was rested in the charge asked by the defendants, was made 'in the spring of 1852.' That agreement was that the goods, which the plaintiff's sons should buy at the store of the defendants, should be received in payment upon the demand here sued on, the amount of which is some four hundred and fifty dollars. The defendants produced and proved accounts against each of the sons of the plaintiff, for goods sold them in 1852, amounting in the aggregate to more than two hundred dollars. The bill of exceptions does not profess to set out all the evidence, nor does it set forth the accounts against the sons of the plaintiff, nor does it negative the idea that some part of these accounts was for goods sold to the plaintiff in the early part of 1852, and before the plaintiff

¹⁵ *Agee v. Medlock*, 25 Ala. 281.

made said agreement that the goods his sons should buy at defendants' store should be received in payment upon the demand here sued on. Upon this bill of exceptions, we must intend that the accounts against plaintiff's sons, produced and proved in the court below, showed that some of the goods therein charged were sold to the plaintiff's sons before the plaintiff made said agreement. This presumption is consistent with the record, and sustains the refusal of the court below to give the charge asked by the defendants."¹⁶

The rule is thus stated in Vermont: "Nothing is to be presumed against bills of exception, with a view to predicate error upon any decision of the court there detailed, but all fair and just intendments and constructions shall be made in favor of the decisions below,"¹⁷ in cases where the bill is reasonably doubtful.¹⁸

§ 661. The rule, however, has not all the rigidity of the old common law rule as to pleadings, which rule sometimes appears to have been carried to the extent of straining a point in order to throw out the pleader. Only where a close interpretation of a bill still leaves the meaning ambiguous does the rule apply, and the bill must receive a reasonable construction;¹⁹ and it is going too far to say that no intendment whatever is to be made in favor of the party thus setting up his rights, but the interpretation is to be as in the usual and ordinary sense of lan-

¹⁶ *Nash v. Shrader*, 27 Ala. 379.

¹⁷ *McCann v. Hallock*, 30 Vt. 236.

¹⁸ *Cram's Adm'r v. Cram*, 33 Vt. 15.

¹⁹ *Smith v. Garrett*, 31 Ala. 492.

guage, as a plain statement of facts for both parties, to which the court is to apply the law.²⁰ But words will not be taken out of their natural import in order to sustain the bill in any case.²¹

§ 662. As examples of the application of the rule under this modification, we will refer to the following instances:—

Where an action was brought by an administrator, and the bill of exceptions recited that it set out all the evidence, and that “the plaintiff proved his demand as administrator,” it was held a sufficient recital to show that he had read his letters of administration in evidence.²²

Where a bill set out that the plaintiff had offered in evidence the note sued on, and then proceeded thus, “The defendant then offered to read the second interrogatory, and answers thereto of R. B., as follows,” &c., “this answer was objected to by the plaintiff. The objection was sustained by the court, and the answer excluded, to which defendant excepted. Defendant then offered to read the third interrogatory, and answer thereto of said R. B., as follows,” &c. “To the reading of which answer plaintiff objected. The court sustained his objection, and excluded the evidence, and defendant excepted,” it was held by a divided court that this must be construed to mean that the entire deposition was offered, and that the counsel offering it was proceeding to read the answers to the several interrogatories, in their regular order.²³

²⁰ *Town of Westford v. Town of Essex*, 31 Vt. 459.

²¹ *Thompson v. Drake*, 32 Ala. 99.

²² *Bell's Adm'r v. Andrews*, 34 Ala. 538.

²³ *Bryant v. Hutchinson*, 30 Ala. 441.

Where a bill stated that the defendant, "for the purpose of showing his title, and the actual boundary of his land, and that said fence was upon his land, then offered to introduce in evidence the field-notes of the survey of the section of land in which the fence in controversy was situated, and the evidence of a survey made according to said field-notes by a county surveyor of said county, and to show that plaintiff had notice of the survey so made by the county surveyor," that "the plaintiff objected to the introduction of this evidence of the field-notes, and the survey made according to them," and that "the court ruled the evidence inadmissible for the purpose offered, and excluded it," it was held by a divided court that the objection was to the facts offered to be proved, and not to the medium or instruments of proof; that the facts being relevant and material, the court erred in excluding the evidence, and that the bill showed merely an offer to introduce in evidence the field-notes and survey delineated on paper, which, in the absence of preliminary proof, being inadmissible, the exclusion of the evidence was not shown to be erroneous.²⁴ The dissent of the chief justice was on the latter branch of the decision.

In a case of the loss of an administrator's deed, where a recital was that "the plaintiff's counsel offered the probate records, showing the appointment of an administrator named," &c., "and also tending to show sale of the lots in question to one A B, and the execution of a deed, which had been lost," it was held that whether these phrases were anything more

²⁴ Dailey v. Fountain, 35 Ala. 27.

than a mere statement that the probate records alone were offered to prove the loss of the deed was at least doubtful; but as the objection was not specially that there was no proof of the loss, but only that the contents were not proved, the case was to be considered as if the bill had stated that "evidence was also given tending to show the loss."²⁵

In a certain case it was urged that the bill did not show that the ruling of the court below was "excepted to," but only "objected to." But the court said, "We think that, when the bill of exceptions shows that the ruling of the court was objected to at the time it was made on the trial, it is sufficient. A bill of exceptions is defined to be 'a statement of the objections made by the parties to the ruling of the court' (Bouv. Law Dic. 200); and the bill in the present case comes fully up to the definition. We are unable to see any sound reason why it should be necessary to state specially that the ruling of the court was excepted to. Such must necessarily be the purpose and intent of every objection which is made to the decision of the court; and the objection becomes senseless and absurd on any other supposition."²⁶

Where certain evidence was recited in a bill, and then it was stated therein, "upon this evidence the plaintiff rested his case;" then evidence adduced by the defendant was set out, and the bill stated, "upon this evidence the defendant rested his defence;" then the bill set out further evidence by the plaintiff, and stated "this rebutting testimony closed the evidence

²⁵ Hoffman v. Harrington, 23 Mich. 90.

²⁶ Sackett v. McCord, 23 Ala. 854.

in the case,"—it was held that it sufficiently appeared that all the evidence given at the trial was included in the bill.²⁷

But where a bill recited an objection to the competency of a witness on the ground that "it appeared, upon his examination *voir dire*, that he had indemnified the defendant's testator against any loss arising from the claim in suit," and that the court overruled the objection, it was held that the appellate court would presume, if the testimony of the witness on his preliminary examination is not set out, that the objection was not sustained by the facts.²⁸

§ 663. It will not be presumed against the bill that it does not contain all the evidence, where the form and language thereof indicate that the whole testimony of each witness is set out verbatim, and the conclusion is, "the evidence was here closed."²⁹

§ 664. In Massachusetts,* if a married woman keeps in the house of her husband intoxicating liquors with intent to sell the same in violation of law, the husband will be liable for such illegal keeping, if he has knowledge of the fact and of her intent, and does not use reasonable means to prevent her carrying out such intent, notwithstanding she is doing business on her own account, having filed a certificate under the statute of 1862, c. 198, and has a United States license as

* Under a former prohibitory law. I do not know whether it is in existence now or not; but no matter, for the purpose of the section above.

²⁷ McClure v. Pursell, 6 Ind. 331.

²⁹ Carter v. Snyder, 27 Mich. 484.

²⁸ Rupert v. Elston's Ex'r, 35 Ala. 79.

a retail liquor dealer. And where a bill of exceptions stated that the liquors were kept by the defendant's wife, who did business on her own account, having filed a proper certificate, and taken out a United States license as a retail liquor dealer, and that he lived in the house with her, but did not state that she kept the liquors in a store-room apart from the husband's house, the construction was adopted that she kept them in the house, and so rendered him liable.³⁰

§ 665. In Texas, where a bill sets out what purports to be a full statement of all the facts given in evidence, it will be presumed that it was intended to embrace both a statement of facts and a bill of exceptions.³¹ Although this seems to have been overruled indirectly by a later case, wherein it is said, "The bill of exceptions assumes to state all the facts, but being only a bill of exceptions, the parties were not required to agree to it in the first instance, and the appellee was not bound to see that the facts were stated, except so far as might be necessary to present the objection to the evidence; and indeed he had no control over it. He should not, therefore, be bound by it as a statement of facts."³²

³⁰ *Commonwealth v. Barry*,
115 Mass. 146.

³² *Carolan v. Jefferson*, 24 Tex.
231.

³¹ *Bennett v. Dowling*, 22 Tex.
662.

CHAPTER IV.

BILLS MUST SHOW INJURIOUS ERROR AFFIRM-
ATIVELY.

§ 666. THE general principle is thus set forth in some early cases in Vermont: "The bill must show that the court below erred; and this must be done either by stating definite law points, or by stating the whole evidence, of which the legal import is embraced in the decision;" and in the latter case, it was apparently held that the bill must state, negatively, that no other evidence was given tending to prove the point included in the decision.¹ And again: "The judgment below will be presumed to be right, and will be affirmed, unless the record show error; also, if the exceptions are so defectively drawn that it cannot be ascertained whether there was error or not."²

But Virginia, standing, so far as I know, entirely alone, formerly held the opposite of this rule; and where a bill of exceptions is vague and indeterminate, the case is remanded for a new trial.³ But the reasonableness of the rule, it seems to me, is easily made apparent; that, where an exceptor fails to establish his objections to the decision below, this relieves

¹ Richardson v. Dennison, 1 Aik. 210 ; Stearns v. Warner, 2 Aik. 26.

² Adams v. Ellis, 1 Aik. 24 ; Eaton v. Houghton, 1 Aik. 380.

³ Hairston v. Cole, 1 Rand, 461 ; Brooke v. Young, 3 Rand, 106 ; Raines v. Phillips, 1 Leigh. 483, and Thompson v. Cumming, 2 Leigh. 322.

it of objection, and it ought to stand, and particularly so when we take into consideration the general rule, that all legal proceedings are to be presumed correct; so that even in regard to inferences deduced from acknowledged facts, it has been held that the construction of the court below will be adopted in doubtful cases.⁴

§ 667. Where a county court based its judgment on the finding of a commissioner in regard to the provisions of a lease, which lease was not set out by the bill of exceptions, the Supreme Court said, "Error must be shown by the exceptions, or the judgment must stand."⁵

And, in Louisiana, it is said, "It has been repeatedly held that this court will not look for objections out of the bill, and that general expressions therein — such as 'illegally taken,' 'the law has not been complied with,' 'it is not the best evidence,' 'is inadmissible' — and the like are insufficient. The party taking the bill must spread on the face of it everything necessary to enable the appellate court to say that the court below erred."⁶

In Texas, it is held that a bill should so state the facts as to exclude any reasonable conclusion of fact by which the decision below could be sustained. And where a bill merely showed that the plaintiff had offered the deposition of a witness taken in another cause between the same parties, the court remarked,

⁴ *Palinan v. Phelps*, 25 Vt. 480.

⁶ *Gray v. Thomas*, 18 La. An. 413.

⁵ *Bartlett v. Wood*, 32 Vt. 377.

"It is not shown by the bill of exceptions, the statement of facts, nor any other part of the record, that the witness was either dead or beyond the jurisdiction of the court even, which must be shown before such evidence can be received."⁷ And this is because all reasonable presumptions will be made in favor of the regularity of the proceedings below, the courts never raising a presumption that error has intervened for the purpose of defeating the judgment.⁸

§ 668. It is not sufficient that it appears that there may have been error. It must be a certainty that there was error before the court will interfere.⁹ And where there were recitals in a bill that plaintiff offered a certain tax deed, which was rejected, and also that he offered a certified copy of a report of commissioners elected, &c., and neither the tax deed nor the report was set out, the Supreme Court affirmed the judgment, remarking, "It is impossible to say from the record whether it was or was not error to reject the offered evidence."¹⁰

§ 669. Where a fact can only be established in a particular manner, and proof thereof is rejected, the record must show that the proof offered was pertinent to that particular manner; and where a defendant "offered to prove," as alleged by his bill of exceptions, that the acknowledgment of a foreign officer was not in due form, but the bill failed to state how or by what proof, it was held that the record did not

⁷ *Sadler v. Anderson*, 17 Tex. 256.

⁸ *Poultney v. Glover*, 23 Vt. 331.

⁹ *Cutler v. Hurlburt*, 29 Wis. 168, and many cases cited.

¹⁰ *Eaton v. Lyman*, 33 Wis. 38.

show error in the rejection of the evidence by the court below, and the presumption of law was in favor of its correctness.¹¹ And where there was a conviction under an ordinance against the sale of articles without license, the court say, "It is probable that there is some ordinance of the city of Galena prohibiting persons, under penalties, from selling merchandise within the city without license, which was the foundation of this action; and it may be true that this ordinance was read in evidence before the jury on the trial, and was accidentally omitted to be made a part of the bill of exceptions. The court is, however, bound to decide questions as they are presented in the record. We can find no evidence to sustain this judgment."¹²

§ 670. Where a witness is rejected below, the bill of exceptions thereto must set out the grounds on which he was rejected.¹³ And if a witness is asked a question, which is objected to, and the objection overruled, the bill must state that he answered the question, and show what the answer was. And where evidence is admitted and objected to, the bill must show wherein the evidence is improper; and if exception is taken to the exclusion of evidence, the bill must show that it was relevant.¹⁴

Where the grounds of the rejection of a witness are stated in the bill, — as, for instance, that he was interested, — but the bill does not negative the

¹¹ *Sessions v. Reynolds*, 7 S. & M. (Miss.) 131.

¹² *Culbertson v. City of Galena*, 2 Gil. (Ill.) 131.

¹³ *Armstrong v. Clark*, 17 Ohio, 497.

¹⁴ *Johnson's Ex'r v. Jennings's Adm'r*, 10 Gratt. (Va.) 1.

ground, it will be taken that the rejection was proper.¹⁵

§ 671. But the presumption of correctness in favor of the proceedings below has its reasonable limits. Thus the Supreme Court of Alabama, in a certain case, remarked, "To avoid the necessity of going such lengths to sustain the decision below, we would better not take the start. If, for the purpose of sustaining the decision, we presume that the magistrate neglected his duty, we sustain the court below at his expense. This is going too far."¹⁶ And an exceptor may be relieved of the necessity of showing the relevancy and materiality of testimony, when these are manifest in the pleadings; or when evidence is in its nature inadmissible, the grounds of the objection need not be stated.¹⁷

§ 672. A general objection to the admissibility of evidence, however, will not be sustained if it be admissible for some purposes, though not for others. In such a case, the bill must show that it was generally admitted without the needful limitations, or, being in, permitted to be used for an incompetent purpose.¹⁸

§ 673. Where the objection is, that there is no evidence to which an instruction given can apply, the party excepting must set out the evidence in order to overcome the presumption in favor of the court below that the giving of the instruction was proper.¹⁹

¹⁵ *McCaskey v. Graff*, 23 Pa. St. 321.

¹⁶ *Davis v. State*, 17 Ala. 418.

¹⁷ *Ibid.*

¹⁸ *Whitcher v. McLaughlin*, 115 Mass. 169.

¹⁹ *Duggins v. Watson*, 15 Ark. 122.

§ 674. It is not only necessary to show error, but to show also that the error was prejudicial to the party excepting. And accordingly the materiality of what is complained of must clearly appear. Thus, where a bill in a criminal case set out a ruling of the judge as to the manner of challenging jurors, but did not show that the prosecuting attorney exercised any right of challenge under the ruling, the court said, "Until he was permitted to exercise it improperly, and did in fact exercise it, the question what the rule should be was not material, but was a mere moot question. A bill of exceptions must show that the question saved was material,"²⁰ the rule being the same, in this regard, in civil and criminal cases.²¹

§ 675. So if, in the progress of a cause, a ruling becomes immaterial, it annuls thereby the exception. The general rule is thus stated by the Supreme Court of the United States, per Story, J.: "As to some of these exceptions which are thus brought before us, it is unnecessary to decide whether they are well or ill founded, because, in the progress of the cause, it is apparent that they worked no ultimate injury to the plaintiff, since, independently of the matters therein stated, it is admitted upon the record that the plaintiff made out a good title in his lessor, which was all the plaintiff proposed to establish by them. And we wish it to be understood, as a general rule, that where there are various bills of exception filed, according to the local practice, if, in the progress of the cause, the matters of any of those exceptions become wholly

²⁰ Commonwealth v. Carey,
108 Mass. 485.

²¹ Shorter v. People, 2 Comst.
(N. Y.) 193.

immaterial to the merits, as they are finally made out at the trial, they are no longer assignable as error, however they may have been ruled in the court below. There must be some injury to the party to make the matter generally assignable as error.”²²

§ 676. Accordingly the matter complained of must be shown to be material in sustaining the issue joined.²³

§ 677. The generality of instructions, if harmless, is no ground for exceptions, even if it withdraws a question from the jury which they might have considered, if it appears there was no evidence which would have authorized them to find that question for the exceptor.²⁴

And where an error is cured by the verdict, as where the plaintiff, notwithstanding erroneous rulings, obtained the full amount of his claim, he cannot urge his exceptions to the rulings.²⁵ And more especially where the ruling operated to the advantage of a party, he cannot object to it.²⁶

§ 678. Where a tenant read certain deeds, with which he proposed to connect his own title, but failed in the attempt, the admission of the deeds was held no ground of exception, especially when the demandant did not ask their rejection, or any rulings on their effect.²⁷

§ 679. And so, where a motion for a new trial is

²² *Greenleaf's Lessee v. Birth*,
5 Pet. 134.

²³ *Stevens v. State*, 14 Ohio,
386.

²⁴ *Copeland v. Copeland*, 28
Me. 543.

²⁵ *Ins. Co. v. Minard*, 2 Comst.
(N. Y.) 102.

²⁶ *Fuller v. Ruby*, 10 Gray,
288.

²⁷ *Webster v. Calden*, 55 Me.
170.

made (in Ohio) on the ground that the special findings of a jury are contrary to evidence, and the motion is overruled, and exceptions taken embodying the whole testimony in a bill, and the Supreme Court finds the alleged error to exist, it will look into the whole record to ascertain whether the error was prejudicial to the party excepting.²⁸

And an exception to a question asked a witness will not be considered, unless it is shown how the question was answered, and that the answer was in some way prejudicial to the exceptor.²⁹

§ 680. And injury must be shown affirmatively. And where the matter admits of a question, it will be taken that the party complaining has not been aggrieved.³⁰ If the complaint be as to testimony, it must appear that the testimony admitted was of a nature to work prejudice.³¹

And so, as to a refusal to give a requested instruction, enough of the evidence must be shown to establish the fact of prejudice positively. It is held not sufficient to "show inferentially, by a forced and unnatural construction of the statements of the exceptions, and in an improbable contingency, that he may possibly have been injured."³² And so, where administrators' accounts were objected to as evidence, but the accounts were not set out, and there was nothing to show injury, the exceptions were overruled.³³ And if evidence was manifestly incompetent, nevertheless,

²⁸ *Oliver v. Moore*, 23 Ohio St. 473.

³¹ *Brooks v. Goss*, *ibid.* 307.

²⁹ *Kershaw v. Wright*, 115 Mass. 361.

³² *Lord v. Inhab., &c.* 61 Me.

³³ *McLoon v. Spalding*, 62 Me.

³⁰ *Bryant v. R. R.* 61 Me. 302. 315.

if, from the nature of the testimony itself, it is apparent that the exceptor was not thereby injured.³⁴

§ 681. Where one admitted that he wrote a certain publication, and that it was a libel, only claiming on the trial the right of going to the jury upon the question of malice, and afterwards complained that the question of libel or not was not submitted to the jury, it was held thereon that he could not have been aggrieved by the fact, nor by an erroneous charge of the judge as to whose province it was to decide the question of libel. His admission annulled all right of protest.³⁵

§ 682. To sum up, we will cite here a statement of the rule by the Superior Court of New York city: "A party excepting must, at his peril, place enough in his bill to show that the court erred to his prejudice. The legal presumption is in favor of the rectitude of the proceeding, and all decisions made will be presumed correct until the contrary appears. When the error relied on consists in the exclusion of evidence offered, the bill must show, affirmatively, that it was relevant when offered and excluded. It is not enough that, in the nature of things, something else might have been proved that would render it relevant and material. It must be distinctly made to appear how it was relevant, and the court will not interfere on account of its rejection, unless, in connection with the evidence previously given, or that and evidence offered to be given, it can be seen to be material."³⁶

³⁴ *Millett v. Marston*, 62 Me. 477.

³⁶ *Van Amringe v. Barnett*, 8 Bosw. 373.

³⁵ *State v. Goold*, 62 Me. 511.

CHAPTER V.

BILLS MUST ONLY PRESENT QUESTIONS RAISED
BELOW.

§ 683. THE rule in the United States Courts is, that exceptions to the opinions given by courts below, must all be taken at the time the opinions are pronounced. But when the whole record is before the court, any exception appearing on it can be taken by counsel which could have been taken below; and it is the duty of the court to give judgment on the whole record, and not merely on the points started by counsel. So, in an early case (*U. S. v. Burnham*, 1 Mason, 62), the court alone took notice of the defect, which was the sole ground of its opinion. And again (in *Patterson v. U. S.* 2 Wheat. 222), it is stated, that "the points made were not considered by the court, and judgment was pronounced on other grounds;" and Justice Washington therein said, "The court considers it to be unnecessary to decide the questions which were argued at the bar, as the verdict is so defective that no judgment can be rendered upon it;" and so the judgment below was reversed.¹ However, in every case, the objection must appear on the record by bill or otherwise.

§ 684. But the general rule in other courts seems to be much more restricted, and requires everything to

¹ *Garland v. Davis*, 4 How. 143.

be disregarded, which was not objected to below, the failure to object being considered a waiver of any error in the proceeding;² and an appellate court only having authority to revise decisions, and, consequently, to consider only such questions as were raised in and decided by the court below.³

However, the Supreme Court of Vermont coincides with the United States Supreme Court so far, it seems, as to hold that, if a bill of exceptions shows an erroneous decision below, it need not show an exception at the time specifically to the ruling, but only that the question was raised and decided;⁴ whereas, I think, the weight of authority is not only that an objection must be raised below, but also that it must appear that the aggrieved party excepted to the ruling of the court thereon.⁵ In Missouri, it is held that the specific grounds of the objection must be set out in the bill.⁶ And in Indiana, that the bill must state that the ground of objection was stated to the court below.⁷

In Maine, it is held that every matter of law intended to be insisted on should, at some part of the trial, be brought particularly to the notice of the court, and no question will be considered, though raised in argument, which was not thus particularly presented to the court below;⁸ and, accordingly, the court, in a certain case, remarked, "Every point intended to be made should be presented to the judge

² *Hunt v. Nugent*, 10 S. & M. (Miss.) 547.

³ *George v. School District*, 20 Vt. 499.

⁴ *Vilas v. Downer*, 21 Vt. 423.

⁵ *Spear v. Lomax*, 42 Ala. 588.

⁶ *Woodburn v. Cogdal*, 30 Mo. 229.

⁷ *Fisher v. Allison*, 46 Ind. 594.

⁸ *Parker v. Flagg*, 26 Me. 184.

at the trial explicitly. If that be not done, he cannot be expected to give any opinion upon it; and if he should not, no exceptions should lie in reference to any such point. It is not enough for a party to say he excepts to the introduction of a witness; he should explain why and wherefore he so objects."⁹ So, in Massachusetts, it is held that no question is open when the judge's attention had not been, at the trial, directed to the point.¹⁰

And so, in New York, if a party moves for a new trial upon a bill of exceptions, he must rely upon the grounds taken and the points made by him upon the trial.¹¹

§ 685. The general rule will be more fully developed, and its application illustrated, by reference to particular topics. Thus an objection as to the form of an action is waived if not made below, as, for instance, if trover is brought against a bailee to recover for goods stolen from him.¹² And as to parties, as if an assignee of a promissory note sues in the name of a payee.¹³ And as to a defence made, as where, to an action on a promissory note, a want of consideration was pleaded, and the judge erroneously ruled that certain facts in evidence did not constitute a valid defence, to which ruling the defendant excepted; it was held that on the hearing of the exceptions the plaintiff could not be allowed for the first time to object that

⁹ *Emery v. Vinall*, 26 Me. 303.

¹¹ *Stainy v. Brown*, 6 Barb.

¹⁰ *Wentworth v. Leonard*, 4 112.

Cush. 417; *Alexander v. Carew*,
13 *Allen*, 71; *Levi v. R. R.* 11
Allen, 303, and cases cited.

¹² *Brown v. Waterman*, 10
Cush. 118.

¹³ *Smith v. Moore*, 3 *Scam.*
(Ill.) 463.

the defence in question was not available to the defendant under his answer,¹⁴ and not even if the writ and answer are referred to in the exceptions as a part of the case.¹⁵

And as to the sufficiency of an answer, as where, on demurrer to the plaintiff's evidence, he was nonsuited, and the bill of exceptions stated an agreement of the parties, "that the various legal questions arising in the case should be submitted to the Supreme Court as upon a statement of facts;" the question of the sufficiency of the answer was held not an open one.¹⁶ And as to the pleadings, as where a set-off was submitted to the jury, although no denial thereof was in the replication;¹⁷ or where there was a misjoinder of plaintiffs not alleged in the answer, but yet proved on the trial by evidence not objected to, the admissibility of such evidence cannot be objected to in the appellate court.¹⁸ So where an answer is not fully responsive to the plaintiff's claim,¹⁹ it must be objected to below, so that the opposite party may have an opportunity of amendment.²⁰ So, in an action upon the guaranty of a promissory note, it cannot be objected on bill that the declaration only contained the money counts, if the objection was not urged at the trial.²¹

§ 686. As to evidence, it is presumed that objec-

¹⁴ *Burnett v. Smith*, 4 Gray, 52.

¹⁵ *Jones v. Sisson*, 6 Gray, 288.

¹⁶ *R. R. v. Newton*, 8 Gray, 596.

¹⁷ *Jones v. Walcott*, 15 Gray, 542.

¹⁸ *Bullock v. Hayward*, 10 Allen, 462.

¹⁹ *Bligh v. James*, 6 Allen, 572.

²⁰ *Wall v. Provident, &c.* 3 Allen, 98.

²¹ *Bickford v. Gibbs*, 8 Cush. 154.

tionable testimony was assented to if no objection was offered to it on the trial.²² And when a bill of exceptions states that a party read the record of a suit as evidence, it must be understood that the entire record was offered and made evidence, although only a part of it was admissible, and unless it appears that the inadmissible portion was objected to, it will be presumed that the objection was waived.²³ And where evidence is offered for a specific purpose, and rejected, the party offering it cannot on exceptions maintain its admissibility on a ground not stated at the trial,²⁴ and the report of a bill of exceptions should likewise give all the facts bearing on the objection,²⁵ and also every position respecting the admissibility of testimony should be distinctly presented to the judge for decision before it can be made the subject of exceptions.²⁶

Where a deposition, with a paper annexed, was offered in evidence, and objected to generally, and the objection was overruled, and the deposition and paper read to the jury, it was held on exceptions that as no specific objection was taken at the trial to the use of the paper, the objection could not afterwards be made.²⁷

And where there was a question of waiver, and an objection was offered in the appellate court to the competency of evidence thereon, it was held the question was not open to him, and the court re-

²² *Stephens v. Lawson*, 7 Blackf. (Ind.) 276.

²³ *Hanson v. Buckner's Ex'r*, 4 Dana (Ky.) 251.

²⁴ *Wheeler v. Rice*, 8 Cush. 205.

²⁵ *Odiorne v. Bacon*, 6 Cush. 190.

²⁶ *Lee v. Oppenheimer*, 34 Me. 180.

²⁷ *Waters v. Gilbert*, 2 Cush. 27.

marked, "It is the more necessary to observe the rule strictly in a case like the present, where, if the objection had been seasonably taken, the defendant might have offered at the trial further evidence on the question of waiver in lieu of that now objected to, which would not have been open to any exception on the ground of incompetency."²⁸

The objection that a question was leading cannot be first made in the appellate court.²⁹

In an action on an insurance policy, where the papers constituting the preliminary proof of loss are not objected to by the company on the ground of inadequacy, the company cannot be allowed afterwards to raise the objection, even if the papers were not offered by the plaintiff, and the court did not require him to produce them. Say the court, "It was competent for them to raise the objection at any stage of the trial after the protest and survey were put in evidence, and its weight and effect would have been the same whether the evidence on which it was based was introduced by the company or by the plaintiff. The company was not aggrieved, therefore, by the ruling of the court, that the plaintiff was not bound to offer these documents in evidence, nor were they shut out from raising objections to the sufficiency of the preliminary proof."³⁰

And where testimony tending to sustain a declaration has gone to the jury without objection, it is held

²⁸ *Leathe v. Bullard*, 8 Gray, 547.

³⁰ *Graves v. Insurance Co.* 12 Allen, 395.

²⁹ *Bennett v. Clemence*, 6 Allen, 17.

that exception cannot be taken that the court permitted a verdict to be given on insufficient testimony.³¹

It is held, in Pennsylvania, that the proper course for a court to pursue, where testimony has been received without objection, is to refuse afterwards to sign a bill of exception thereon, and leave the party to a request for an instruction to the jury to disregard it.* An allowance of such an exception, however, does not render it valid. The Supreme Court may still treat it as too late, and disregard it.³²

§ 687. The objection of variance between the allegations in a petition for review, and the proof at the hearing, cannot be first raised in the appellate court,³³ nor between an indictment and the proof.³⁴ And the general rule is thus stated by the Supreme Court of Vermont: "No objection on the ground of variance, which was not raised in the County Court, and which might there have been obviated by amendment, should be sustained in this court, unless the variance is both apparent on the record and of such a character that the judgment, if affirmed, would fail to protect the parties in reference to the matter actually litigated."³⁵ And again: "It is a general rule that the Supreme Court will not revise any questions except such as appear to have been raised in the court below; and

* But, as we have seen, this is not generally allowed to be done.

³¹ *Stearns v. Bliss*, 12 Vt. 577.

³⁴ *State v. Chandler*, 15 Vt.

³² *Duvall's Ex'r v. Dailey*, 38 Pa. St. 58.

425.

³⁵ *Peck v. Thompson*, 15 Vt.

³³ *Hutchinson v. Gurley*, 8 Allen, 23.

644.

this rule applies with peculiar propriety to questions of variance which, if raised in the County Court, can generally be removed either by further proof or by amendment.”³⁶

And so an objection, founded on an alleged variance between the proof and the declaration in respect to the consideration of a contract, must be made below.³⁷

§ 688. Nor can the question whether a verdict is against the evidence be raised on a bill of exceptions³⁸—not even in a criminal case in general.³⁹

And no exception lies on account of error in stating the evidence to the jury, unless the attention of the judge is called to it at the time.⁴⁰ And the rule applies as well to the court acting as a jury.⁴¹

§ 689. In general, it is not non-direction, but misdirection, that can be excepted to. And so one cannot object that certain instructions were not given below, unless he asked for them specifically.⁴² Thus, if a court is not requested to charge as to the nature and effect of a written instrument in evidence, the omission to do so is not a ground of exception, unless the liability of the party is to be solely determined by the legal construction to be put upon it,⁴³ or as to the effect of testimony;⁴⁴ for, although it is held that where the court assumes to charge at all, it should charge the whole of the law applicable to the case,

³⁶ *Brintnall v. R.R.* 32 Vt. 673.

³⁷ *Gregory v. Gleed*, 33 Vt. 409.

³⁸ *Walker v. Penniman*, 8 Gray, 233.

³⁹ *Commonwealth v. Morris*, 1 Cush. 394.

⁴⁰ *Cutler v. Welsh*, 43 N. H. 497.

⁴¹ *State Bank v. Conway*, 8 Eng. (Ark.) 353.

⁴² *Brigham v. Wentworth*, 11 Cush. 126.

⁴³ *Badger v. Bank, &c.*, 26 Vt. 434.

⁴⁴ *Purinton v. Pierce*, 38 Me. 449.

yet the party, even in a criminal case, waives the right to object, if he does not specially call the attention of the court to the point which he desires presented.⁴⁵

And so where, in an action on a contract, the defendant, on cross-examination, testified that he had no objection to paying the debt, and the plaintiff's counsel argued to the jury that the debt was thereby admitted, but no ruling was asked or admitted on that point, it was held the plaintiff had no ground for exception.⁴⁶

In Louisiana, even where the judge refused to grant a trial by jury, but the bill of exceptions did not set out the reasons of the judge for his refusal, nor the grounds on which the ruling was excepted to, the Supreme Court refused to take cognizance of the matter.⁴⁷

§ 690. As to instructions actually given, the objection must be made known below also. Thus it is said, in a certain case, "It is objected that the plaintiff is not entitled to damages for infringements committed anterior to the re-recording of his patent, and that the jury were not correctly instructed on that subject. The charge imports a general liability of the defendants, and no intimation is given that their liability ought to be so qualified. This point was not raised at the trial. The court was not requested to instruct the jury otherwise, nor was a specific exception taken to the direction as given. If the defend-

⁴⁵ *Cato (a slave) v. State*, 9 Fla. 176; *Chamberlain v. Porter*, 9 Min. 260.

⁴⁶ *Briggs v. Rafferty*, 14 Gray, 525.

⁴⁷ *Davis v. Millandon*, 14 La. An. 808.

ants wished more definite instructions, or desired that those given should be qualified, they should have called the matter to the notice of the court, that the mistake, if one, might have been then rectified. No advantage can now be taken, if an error has been so committed.”⁴⁸ And the court of North Carolina quite sharply criticises such attempts, and says, “If there was any error, it was but just to the judge that his attention should be called to it in order that he might correct it, and the law requires that it should be so. We are reasonably indulgent of mere irregularities in the cases sent up, if we can get at the merits, but we cannot allow cases to be flung at us in disorder, in the hope that some advantage may be gained by accident, or that we will pass by all errors on the part of the appellant, in order to get errors on the part of the appellee. The burden is on the appellant.”⁴⁹

And where, in an action on a promissory note, to which the defence was breach of warranty, and false and fraudulent representations, the defendant contended that the burden of proof was on the plaintiff, and that if, on the whole evidence, the jury were in doubt upon the warranty or the fraud, the defendant should have the benefit of the doubt, but requested no instructions beyond what the judge gave, namely, that the production of the note made a *prima facie* case, and the plaintiff would be entitled to recover unless it appeared that there was a breach of warranty, or false representations, as claimed by the

⁴⁸ Emerson v. Hogg, 2 Blatch. (U. S.) 13.

⁴⁹ Sampson v. R. R. 70 N. C. 406.

defendant, it was held there was no ground for the defendant to except.⁵⁰

§ 691. The ruling of the court on an objection offered must be excepted to at the time, and so appear in the bill of exceptions, as also the ruling itself must be set out.⁵¹ In Maine, where there are no exceptions taken on a judge's rulings as to matters of law, the case is considered in the Supreme Court as on report from the justice before whom it is heard.⁵²

§ 692. In an action for services rendered, defendants requested a ruling, that if the services were voluntarily rendered, and not necessarily beneficial, they created no debt without a subsequent promise to pay for them. This was refused, but an instruction was given that the jury could find for the plaintiff if they found that the services were performed, and the defendants subsequently promised to pay for them; no question was raised as to the effect of such promise, if made. Held that the defendants could not at the argument of exceptions to this instruction for the first time object that such promise, if made, rested only on an executed consideration.⁵³

§ 693. The legality of a meeting cannot be questioned first in the appellate court.⁵⁴

§ 694. A party cannot avail himself of a defence under the statute of limitations unless it was interposed in the court below.⁵⁵

⁵⁰ Packard *v.* Clapp, 11 Gray, 124.

⁵¹ Pomeroy's Lessee *v.* State Bank, 1 Wall. (U. S.) 592.

⁵² Banchor *v.* Mansell, 47 Me.

60.

⁵³ Chamberlain *v.* Whitford, 102 Mass. 448.

⁵⁴ Hart *v.* Holden, 55 Me. 574.

⁵⁵ Wilson *v.* Van Winkle, 2 Gil. 687.

§ 695. Nor can a verdict be corrected in the appellate court, where it appears that a defendant has through accident or misapprehension allowed payments made after the decease of an intestate, and which might have been recovered back, to be deducted without objection to the plaintiff's claim.⁵⁶ Nor can the objection, that the true consideration in a contract of guaranty is not set out in a declaration first be taken at the hearing of exceptions in the appellate court. Nor that instructions were not given as to the distinction between a pledge and a mortgage when these were not requested.⁵⁷

§ 696. Where a bill of indictment charged the stealing of an ox, and the bill of exceptions did not show that any question was made below as to whether the animal was alive or dead when stolen, it was held too late to rely upon matters in the appellate court, tending to show that the ox was dead when stolen.⁵⁸ And whether a person obtaining goods by false pretences is guilty of a felony is not an open question, unless the point was brought up in the lower court.⁵⁹

§ 697. Where a party took exceptions to the admission in evidence of the records of proprietors of lands held in common in Massachusetts, solely on the ground that the proprietors were not such as were authorized by the statutes to form themselves into a corporation, and liberty was given by the judge to refer to the records in the argument on the exceptions,

⁵⁶ *Haverhill Loan, &c., v. Cronin*, 4 Allen, 144.

⁵⁷ *Conillard v. Duncan*, 6 Allen, 440.

⁵⁸ *State v. Jenkins*, 6 Jones (N. C.) 19.

⁵⁹ *Abbott v. Marshall*, 48 Me. 54.

it was held that the party must be confined to the specific objection taken by him at the trial, and that therefore he could not object that the records did not show that the proprietors, in organizing themselves as a corporation, proceeded in all particulars conformably to the requisitions of the statutes.⁶⁰

§ 698. In Massachusetts, on the report of the presiding judge, and at the argument before the full court, the breach of a warranty in a policy of insurance not alleged in the answer, nor relied on at the trial, cannot then be taken advantage of.⁶¹ And in Illinois, where a bill of exceptions contains all the evidence in the case, which is insufficient to warrant the finding of the jury, yet if no exception is taken to the decision of the court overruling the motion for a new trial at the time it was announced, that decision cannot be assigned for error.⁶²

§ 699. Where, in an action against the indorser of a bill, the defendant moved for a nonsuit, without stating any specific objection to the notice of protest, and the motion was denied, it was held that, on a motion for a new trial on a bill of exceptions, the sufficiency of the notice could not be inquired into.⁶³

And an objection that the declaration does not allege defendants to be common carriers must be made below.⁶⁴

§ 700. Where a bill of exceptions showed that the

⁶⁰ Howard v. Hayward, 10 Met. 409.

⁶¹ Denny v. Ins. Co. 13 Gray, 492.

⁶² Pottle v. McWorter, 13 Ill. 454.

⁶³ Cowperthwaite v. Sheffield, 3 Comst. (N. Y.) 243.

⁶⁴ Sanford v. R. R. 11 Cush. 155.

copy of a will was objected to on the trial, "because not authenticated according to law," and "because the said paper had not been filed in court according to law," but the precise character of the objections was not stated, and yet, in argument, it was urged that the certificate of the clerk was insufficient for want of a seal, and the exhibit was filed during the term at which the cause was tried, and without the one day's notice required by a rule of chancery practice, it was held that the objections were not sufficiently specific, and that, as it did not appear that they were made, or could have been made, in the court below, they could not avail in the appellate court.⁶⁵

§ 701. If evidence of a declaration made in the presence of a party to a contract, without reply from him, is objected to on the sole ground that the declaration was not heard by him, and the evidence is submitted to the jury with instructions to disregard it unless satisfied that the party heard the declaration, the objection cannot be taken for the first time in the appellate court at the hearing on exceptions, that the declaration was not such as, if heard, called for a reply.⁶⁶

⁶⁵ *Ingram v. Smith*, 1 Head (Tenn.) 412.

⁶⁶ *Hildreth v. Martin*, 3 Allen, 371.

CHAPTER VI.

GENERAL EXCEPTIONS.

§ 702. SOMETIMES general exceptions are allowable and sufficient; at other times generality is a fatal fault. Thus it is held that exceptions to either a general or special charge relate only to questions submitted to the jury, and, as we saw in the last chapter, questions not submitted cannot be made the subject of an exception. And, therefore, when all of the instructions given by the court as to the questions submitted are erroneous, a general exception is sufficient, although other propositions may have been correctly stated. And it is held too much to say that a general exception to a charge is an exception to every word in it, and, therefore, bad, if there be one word of truth in the whole charge, which, in the very baldest cases, may ordinarily be taken for granted.¹ Where the court finds the facts even, but announces the decisions of law separately, a general exception is sufficient in these terms: "The plaintiff excepts to the decision of the court upon the trial of this action upon the matters of law" [and equity in an equitable case].²

Upon the trial of a cause before a judge, a general exception to the decision of the judge, drawing a

¹ *Schenck v. Andrews*, 57 N. Y. 149.

² *Ludlow v. Gilman*, 18 Wis. 581.

single conclusion of law from an undisputed state of facts, is available on appeal.³

And where separate demurrers are filed to different paragraphs of an answer, the demurrer to each calls the attention of the court to each particular paragraph; and upon the demurrers being sustained as to some, an exception to the ruling is sufficient, without stating that it was taken to the decision upon each particular paragraph.⁴

And as to the introduction of evidence, although it is the general rule that the ground of the objection must be shown, yet to this rule there may be exceptions depending upon the character of the proposed evidence, as that it may be so plainly incompetent for all purposes that a general objection to its introduction will be sufficient.⁵

§ 703. But it is plain that a general exception to partial error is unavailable, since it blends together undistinguishably what is proper and what is improper, and thus makes confusion. And so a general exception to a charge cannot be entertained if any part of it is correct.⁶ And so a mere note that "the defendant's counsel excepted," is too general, and cannot be regarded as an exception.⁷ And if there be a series of decisions, a general exception will not hold if a single one is correct;⁸ as, for example, where no special exceptions are taken to the rulings

³ *Pratt v. Foote*, 5 Seld. (N. Y.) 463.

⁴ *Flatter v. McDermott*, 15 Ind. 390 (note).

⁵ *Cheatham v. Riddle*, 8 Tex. 162.

⁶ *Howland v. Willetts*, 5 Seld. (N. Y.) 171.

⁷ *French v. White*, 7 Duer (N. Y.) 254.

⁸ *Elton v. Markham*, 20 Barb. 346.

as they occur during the trial, but, at the close of the case, there is a single exception to all the rulings, this will not prevail, unless all the rulings are erroneous.⁹

A general exception to a charge can only be sustained where the charge consists of a single proposition, or else where the whole scope of the charge asserts and explains a single question or principle.¹⁰ And this is founded on the principle to which we have previously adverted, that the design of a bill of exceptions is not to draw the whole matter into controversy again;¹¹ and bills containing superfluous and irrelevant matter are held highly censurable, as casting increased labor upon the court and increased expense upon parties,¹² so that the whole of a voluminous charge should never, or rarely, be presented.

Yet enough must be set out to show the error complained of; and so, where only a portion was set out, under the general exception, "To the giving of all such instructions plaintiff at the time excepted," and the record showed that other instructions had been given, some of which were acknowledged to have been correct, the court remarked, "Grouping the instructions given by the court, and those given on the motion of the defendant, and excepting to all of them in this general manner, some of them being good will not enable the plaintiff to select a portion of them, and have those reviewed by this court."¹³

⁹ Cronk v. Canfield, 31 Barb. 172.

¹⁰ Robinson v. R. R. 27 Barb. 519.

¹¹ Ex parte Crane, 5 Pet. (U. S.) 199.

¹² Lincoln v. Claffin, 7 Wall. 137.

¹³ McCaleb v. Smith, 24 Iowa, 591.

And a general exception to the correctness of an average adjustment and apportionment, passed upon by a referee, does not entitle an appellant to argue that the referee erred in regard to some of the items.¹⁴

In Iowa, the rule is so closely followed, that it is held that even if a single paragraph in a whole series of instructions is correct, a general exception is nugatory.¹⁵

It is in no wise different in a criminal case.¹⁶

In New Hampshire, however, the court will entertain a cause on points raised in argument, even when a general exception to a charge is overruled for generality.¹⁷ This perhaps may happen anywhere in special cases, where the record itself affords other matters on which the court can act, and to which the argument is confined.

In a motion for a new trial, on the reasons that "error of law accrued at the trial, and was excepted to at the time," and "the court erred in its instructions to the jury," the reasons were held insufficient to support the motion, on account of their generality and vagueness.¹⁸

An exception to the refusal of the court to charge is subject to the same rule as one to the giving of instructions.¹⁹

§ 704. Where an instruction or conclusion of law

¹⁴ *Jones v. Bridge*, 2 Sweeney (N. Y.) 431.

¹⁵ *Meershon v. Ins. Co.* 34 Iowa, 88.

¹⁶ *Jenks v. State*, 17 Wis. 666.

¹⁷ *Reynolds v. R. R.* 43 N. H. 588.

¹⁸ *Elliott v. Woodward*, 18 Ind. 185.

¹⁹ *Sumner v. Blair*, 9 Kan. 531.

is in general correct, but subject, perhaps, to a modification in some particular not affecting its general correctness, a general exception is improper.²⁰

§ 705. Maryland would seem to be an exception in the maintenance of the general rule, since it has there been held, that, where several distinct and separate questions are submitted to the decision of the court by requests for instructions, the decision of one of which does not supersede the necessity of determining the others, an exception in general terms must be regarded as if each question raised had been separately determined, and formed the subject of an independent bill of exceptions.²¹

CHAPTER VII.

SPECIFIC EXCEPTIONS.

§ 706. A SUCCINCT definition of specific exceptions was given in an early case in Vermont in substance that it is such a statement of the matters complained of as that nothing is left to conjecture,¹ the definite law points being set forth explicitly.² It is not in general necessary that the reasons given by the court below for its decision should be set out, but only what the decision was, with so much of the proceedings as may

²⁰ *Knox v. Webster*, 18 Wis. 426.

¹ *Adams v. Ellis*, 1 Aik. 27.

² *Richardson v. Denison*, 1 Aik. 210.

²¹ *Bank v. Bank*, 10 Gill. & John. 357.

be needful in order to understand the bearing of the decision upon the case at bar.³

§ 707. If evidence which is admissible for any purpose is admitted, and it is incompetent upon a particular branch of the case, and no specific exception is taken, or ruling asked for, the general exception to its admission will be overruled.⁴

§ 708. A New York case aptly sets forth the principle in its bearing upon testimony in a capital trial thus: "The bill of exceptions does not profess to set out all the evidence given on the trial, nor all given by this witness. How these statements, apparently altogether unimportant, came to be made, or whether they were or were not circumstances casually mentioned in the course of an extended narrative, can hardly be collected from what appears. I certainly do not perceive their relevancy, nor any ground on which they could have been desired by the district attorney. They seem to be fragments of a narrative which, taken as a whole, may have been not only material, but competent, although these disjointed parts are apparently as little relevant to the case as they are coherent among themselves. . . . The objection taken was to all evidence of the acts of the witness when the prisoner was not present. This was too broad. Many things done by the witness might be competent evidence, although done when the prisoner was absent. Under this objection, if allowed, the witness could not have stated where he was at any time, or anything done by him, unless the prisoner was present. In the

³ *Carey v Rice*, 2 Kelley (Ga.)
407

⁴ *Packer v. Lockman*, 115
Mass. 72.

form in which the objection was taken, it was properly overruled; and before we can say that there was error in receiving these fragments of the testimony of the witness, which are inserted in the bill of exceptions, it must be shown that they were particularly objected to or insisted upon as competent evidence, and received as such, or the whole of the testimony given by the witness must be stated, that the court may see that these particular parts were objectionable.”⁵

§ 709. Both the decision complained of and the errors therein are to be specified distinctly, so that nothing shall be left to surmise or conjecture in the appellate court.⁶

§ 710. In Maine, the court say, “Questions of law arising during a trial may, in this state, be reserved by a bill of exceptions in a summary mode, as well as by a report of the presiding judge. When the latter mode is adopted, it must appear by the report that certain questions of law were expressly reserved, to be decided by the full court. A mere statement that certain instructions were given or refused does not constitute a reservation of them for future decision.”⁷

§ 711. Where objections were, that a certain lot was not legally taxed, that the proceedings to authorize the sale were not in conformity with the statute, according to the evidence as it stood, and therefore a lease, under which the plaintiff claimed, not warranted, and void, the decision of the court being that the tax

⁵ *People v. Bodine*, 1 Denio (N. Y.) 313.

⁷ *Sanford v. Lebanon*, 31 Me. 126.

⁶ *Weathers v. Doster*, 6 Ga. 228.

was legally imposed, and the proceedings regular, and the court thereon directing a verdict for the plaintiff, it was objected that the exceptions were not specific enough to be available in the appellate court; but the court held them sufficiently specific.⁸

§ 712. An exception to a charge, "and every part thereof," is not sufficiently explicit, unless the charge is wholly erroneous; the specific portions excepted to must be pointed out.¹⁰

And where causes are tried by the court on issues of fact, the exceptor must make his exceptions so specific as to show whether, upon appeal, he desires to review the judge's finding of facts, or his conclusions of law thereon, or both. And where there are several facts found, or conclusions of law stated, the exceptions must show to which objection is made.¹¹

The particular reasons for requiring the specification of the particular points in the charge, or the omission to charge, which are excepted to, are two-fold; (1) To bring the matter to the attention of the court below for correction;¹² and (2) To set out the error clearly before the appellate court for decision thereon.

§ 713. An objection to a deposition that it "is not taken in due form of law," is not available, not being explicit, and merely general.¹³

⁸ *Hubbell v. Weldon, Hill & Denio* (N. Y.) 145.

⁹ *Tomlinson v. Wallace*, 16 Wis. 235.

¹⁰ *Hicks v. Coleman*, 25 Cal. 146.

¹¹ *Gilman v. Thiess*, 18 Wis. 528.

¹² *Goodwin v. Perkins*, 39 Vt. 605.

¹³ *Manning v. Gasbarie*, 27 Ind. 399.

§ 714. The rule that a general exception to a series of instructions is unavailable if any one of them is correct, is relaxed, in Indiana, so that an objection need not be specific, but may be general, if the charge is an entirety,¹⁴ the court going, I suppose, upon the principle that, in a connected chain, the breaking of any link severs the chain, and "tenth or ten-thousandth breaks the chain alike." Well, perhaps so; but this is certainly not the general rule.

§ 715. Where an instruction is requested and refused, that the action on trial cannot be maintained, the bill of exceptions must show specifically on what ground the request was made, in order to render the refusal reviewable.¹⁵

§ 716. Exceptions must be taken to the specific rulings during the progress of the cause.¹⁶

§ 717. It is held, however, that an exception to conclusions of law merely is not held to the same strict rule as excepting to a charge. Where a charge is good in part and bad in part, the exception must specifically point out the portion complained of as erroneous, so that the court may have an opportunity to correct; but exceptions to conclusions of law come after the power to rectify has passed from the court, so that the reason for the strict rule in the former case fails.¹⁷

§ 718. In an Indiana case, the conclusion of a bill of exceptions was, "Whereupon the plaintiff at the

¹⁴ *Hersleb v. Moss*, 28 Ind. 358.

¹⁵ *Lawrence v. Chase*, 54 Me. 196.

¹⁶ *Harrison v. Bartlett*, 51 Mo. 170.

¹⁷ *Newlin v. Lyon*, 49 N. Y. 661.

time noted exceptions on the margin of a part of the charges given by the court to the jury, and at the time excepted to each of the charges severally, upon which exceptions were noted on the margin thereof at the time," and the court announced that they were unable to determine therefrom whether the plaintiff excepted to each and all of the instructions given, or only to such as had the exceptions noted on the margin. And the difficulty was rendered the more insurmountable by the clerk noting that there were no instructions on file with exceptions entered on the margin.¹⁸

§ 719. In regard to stating evidence, a bill must also be definite. Thus, where it was stated that a record was offered to show an outstanding title, which the court rejected, &c.; and, again, that the defendant offered evidence to attack the correctness of the surveyor's record, and to show frauds in certain dates of location and survey, which was ruled out by the court, the exceptions were held too vague and uncertain in not stating what the evidence was.¹⁹ And so a statement that testimony was introduced tending to show, &c., has been held unavailable from want of explicitness.²⁰ And so, to enable an appellate court to determine whether the sayings of a person proposed to be given in evidence were properly admitted, the expressions must be given; and, unless exceptions are plainly and distinctly set forth, they cannot be considered.²¹ And where the court excludes the answer of a witness,

¹⁸ *Cobb v. Krutz*, 40 Ind. 324.

¹⁹ *Styles v. Gray*, 10 Tex. 503.

²⁰ *Walker v. Lessee*, 2 Ohio St. 593.

²¹ *Cleghorn v. Love*, 24 Ga. 591.

or rather refuses to allow the witness to answer at all a particular question, the exceptor must show by his bill what he expected or believed the witness would prove in response, for otherwise the court cannot say that the rejection of the answer was prejudicial.²² And so, objections to the reading of evidence and exhibits in chancery must be clear and specific.²³

§ 720. Where it was said, "The court charged as on file, to which plaintiff excepted, and asked the court to instruct as in paper on file, which was refused, and plaintiff again excepted," and the transcript contained what purported to be instructions, but unsigned and not identified, it was held that such a mode of referring to papers and instructions was insufficient.²⁴ And so, where a bill merely stated that "exceptions were taken to the rulings of the court, and to its refusal of instructions to the jury appearing in the motion for a new trial," it was held that the appellate court could not go to the motion for a new trial in quest of the information which ought to have been afforded by the bill of exceptions.²⁵ And the words "The court charged the jury on questions of fact" have been held unavailable,²⁶ since the appellate court will not search for error, but only act on errors specifically presented.²⁷

§ 721. And, in Alabama, it has been held that a recital in a bill of exceptions that "the court decided "

²² *Zipper v. Commonwealth*, 1 Met. (Ky.) 6.

²³ *Ingram v. Smith*, 1 Head (Tenn.) 418.

²⁴ *Freher v. Geeseka*, 5 Clarke (Iowa) 472.

²⁵ *Harmon v. Chandler*, 3 Clarke, 150.

²⁶ *Brewington v. Patton*, 1 Clarke, 121.

²⁷ *Sands v. Woods*, *ibid.* 263.

certain legal propositions, is insufficient to show that such decisions were given to the jury as instructions.²⁸

But it is not material that a decision be set forth in its precise language, so the meaning remains unimpaired by the different phraseology,²⁹ and the error be plainly and distinctly set out,³⁰ and each ruling objected to particularly specified.³¹

§ 722. Where a deed was offered and ruled out, and the bill of exceptions did not show that it was a tax deed, the bill was held unavailable.³²

And where a very voluminous charge was given, and defendant excepted generally, and also excepted to the "rejection of the instructions asked for by defendant, to all that part of the charge wherein the instructions given at the request of the defendant were in any wise qualified, or against the defendant to all that part wherein the court commented on the evidence, and to all the remarks to the jury not relating to points raised or to the merits of the case," it was held that the exceptions raised no point except as to the instructions asked by the defendant, and refused.³³

²⁸ *Cotton v. Bradley*, 38 Ala. 506.

²⁹ *Spaulding v. Sprang*, 38 N. Y. 16.

³⁰ *Taylor v. Flint*, 35 Ga. 124; *Burleson v. Hancock*, 28 Tex. 81.

³¹ *Case v. Fogg*, 46 Mo. 47.

³² *Zimmerman v. Turner*, 22 Wis. 371.

³³ *Strohn v. R. R.* 23 Wis. 126.

CHAPTER VIII.

OTHER REQUISITES.

§ 723. **BILLS** of exception must not be frivolous,¹ and such are sometimes punished with double costs.² As where there is an exception to that which is no ground of exception.³

Nor relate to immaterial issues or instructions.⁴

§ 724. Bills must not be premature; as, for instance, exceptions to interlocutory or preliminary decisions brought before the appellate court before the final disposition of the case.⁵ Thus an exception to sustaining a demurrer to a plea,⁶ or overruling a demurrer to an indictment,⁷ cannot be brought up until final judgment thereon, and a disposal of the case, although a demurrer sometimes may end the case if the party elects to abide by it. So where an order allowing a supplemental answer is excepted to.⁸

§ 725. An assignment of errors cannot enlarge a bill of exceptions, but must be thereby supported.⁹ And where exceptions are taken only to the conclu-

¹ Gen. Rule, 3 Cow. (N. Y.) 439.

² *Williams v. Greene*, 2 Cush. (Mass.) 466.

³ *Mansfield v. Corbin*, 4 Cush. 213.

⁴ *Vennard v. McConnell*, 11 Allen, 562; *Commonwealth v. Bailey*, 11 Cush. 416.

⁵ *Daggett v. Chase*, 29 Me. 356.

⁶ *Commonwealth v. Sallen*, 11 Gray, 52.

⁷ *Commonwealth v. Paulus*, 11 Gray, 305.

⁸ *Marshall v. Merritt*, 13 Allen, 274.

⁹ *Smith v. Mitchell*, 6 Ga. 457

sions of law in a case tried by the court without a jury, the findings of fact are not reviewable.¹⁰

§ 726. Where blanks are left in a bill which are not filled up by the documents intended, and these documents are not referred to so as to identify them, it is a fatal irregularity.¹¹ However, if a bill is imperfectly drawn, but yet the points are ascertainable thereby, the appellate court will entertain the case.¹² But a bill must set out evidence, and not merely the substance thereof.¹³

§ 727. If an exception alleged does not state the ruling excepted to, and the evidence to which it is applied, with substantial accuracy, so as to present the same question, and in the same aspect, to the appellate court as to the court below, the exception cannot be entertained, either in the form in which it was, or in that in which it appears that it should have been tendered to the presiding judge.¹⁴

§ 728. If, after verdict for a plaintiff, the defendant dies, the court may pass upon the exceptions he had alleged; and, if just, to enter judgment *nunc pro tunc*, as of the term when the verdict was rendered, although no administrator had been appointed in the state — so held in Massachusetts.¹⁵

¹⁰ Brant *v.* Salisbury, 23 Wis. 515.

¹¹ Sexton *v.* Willard, 27 Wis. 468.

¹² U. S. *v.* Morgan, 11 Howard, 154.

¹³ Blankenship *v.* R. R. 48 Mo. 376.

¹⁴ Sawyer *v.* Iron Works, 116 Mass. 424.

¹⁵ Tapley *v.* Martin, 116 Mass. 275.

CHAPTER IX.

DISCRETIONARY MATTERS NOT EXCEPTIONABLE.

§ 729. IT is well settled that a proper exercise of judicial discretion is not reviewable in an appellate court, even though there may have been a mistake committed therein,¹ provided the discretion has not been or cannot be reduced to rule.²

§ 730. Thus in regard to motions; as, for example, motions to dismiss, where a court has authority to entertain the suggestion of a fraudulent abuse of the process of the court upon a summary motion to dismiss, without putting the defendants to plead, and try it in regular form, it may, on discretion, decline so to do.³ It is held, in Rhode Island, that "the power incident to every court to regulate all proceedings in it, and the conduct of all suitors and officers, which makes it a duty to see that those proceedings and that conduct are in good faith, and that its forms of proceeding are not used in bad faith and as a cloak for any fraudulent or illegal purpose, is broad enough to warrant a dismissal of a suit, not merely upon the motion of the other party, but upon the mere motion of the court itself. In every case, therefore, where it appears to the court that the party is conducting in

¹ *Masseaux v. Brigham*, 19 Vt. 460.

³ *Crosby v. Harrison*, 116 Mass. 117.

² *Thayer v. Elliott*, 16 N. H. 103.

bad faith towards the court itself by attempting, under the forms of law, to impose upon it a jurisdiction which the court is prohibited from exercising, it may properly, and as a just punishment for such attempt, dismiss the party. But, at the same time, though the court may dismiss, it is a matter in its discretion depending on the circumstances in each case, and upon the facts as they appear, the court must necessarily be the sole judge. This is not a matter that can properly be reviewed.”⁴

Where the declaration shows an amount necessary to give jurisdiction to a court, but it afterwards appears by the evidence that the amount was so stated in order to give jurisdiction to the court, and was fraudulent by stating more than the plaintiff had any expectation of recovering, it is in the discretion of the court to dismiss the cause for want of jurisdiction. But where suit is brought on a specific sum, as a note or penalty, where the jurisdiction is apparent on inspection, whereby it appears that the sum is too small to give jurisdiction, the court has no discretion, but is bound to dismiss.⁵

A refusal to dismiss a replevin suit because of erasures and interlineations in the bond, is not exceptionable, this being a matter of fact to be determined by the judge, whether the interlineations or erasures were made before it was executed.⁶

Where an order is entered dismissing a case, and a

⁴ *Edwards v. Hopkins*, 5 R.I. 143.

⁶ *Memsir v. Crosby*, 6 Gray, 335.

⁵ *McGray v. Wheeler*, 18 Vt. 503

motion is made to strike out the entry from the docket, it is held not reviewable accordingly, in Massachusetts, this being in effect a motion for a new hearing.⁷

In general, entries on a docket, by consent of parties, under the direction of the court, merely to facilitate business, such as the entries "to become nonsuit," "to be defaulted," "to continue," "to await," "to abide," &c., are wholly discretionary; and where they are stricken off on motion, the action of the court cannot be reviewed.⁸

So motions to quash an indictment are addressed to the discretion of the court, which may quash, or otherwise require the accused to plead or demur, but is not bound, *ex debito justitiæ*, to dispose summarily of the prosecution on such a motion.⁹ And it is thus even when the motion is made on the ground that the grand jury who found the indictment was illegally drawn.¹⁰

And so a refusal to order a nonsuit is not reviewable, being discretionary.¹¹

And, in a criminal case, a court may, in its discretion, refuse to allow a prisoner to withdraw a plea of not guilty, and file a special plea instead.¹²

§ 731. A refusal to compel a plaintiff to elect on which count he will proceed, is addressed to the discretion of the court, and not a subject of exception.¹³

⁷ Horton v. Wead, 9 Allen, 538.

⁸ Bank v. Stevens, 39 Me. 537.

⁹ State v. Barnes, 29 Me. 563.

¹⁰ State v. Maher, 49 Me. 569.

¹¹ Priest v. Wheeler, 101 Mass. 479.

¹² Commonwealth v. Blake, 12 Allen, 189.

¹³ Carlton v. Pierce, 1 Allen, 28.

And so with regard to the decision on a demurrer to a plea of abatement.¹⁴

§ 732. No exception lies to the refusal of a judge to allow separate trials to defendants jointly indicted, although, by trying them together, some of them are prevented from introducing evidence which would be admissible in their behalf if tried separately.¹⁵

§ 733. The admission of parties into a suit in partition is a matter of discretion with the court.¹⁶

§ 734. In some states, a refusal to grant a continuance is held not reviewable;¹⁷ as, for instance, to allow an officer to amend his return;¹⁸ or to obtain a record of conviction to show the incompetency of a witness by reason of infamy.¹⁹

§ 735. In allowing or refusing amendments where the statute does not expressly grant and define the right, the rulings of the court are held discretionary. As in disregarding a variance as amendable;²⁰ or allowing the amendment of a complaint.²¹ To except to refusals, the party must show an unquestionable right under the law to amend.²² And where a motion made for the amendment of the declaration by adding a new count was refused, it was held that the plaintiff had no ground of exception, but, even had it been

¹⁴ *Richmond v. Whittlesey*, 2 Allen, 233.

¹⁵ *Commonwealth v. Robinson*, 1 Gray, 555.

¹⁶ *Huntress v. Tiney*, 46 Me. 90.

¹⁷ *People v. Colt*, 3 Hill, 432; *Monk v. Beal*, 2 Allen, 585.

¹⁸ *Pickering v. Reynolds*, 111 Mass. 83.

¹⁹ *State v. Damery*, 48 Me. 327.

²⁰ *Conover v. Insurance Co.* 3 Denio (N. Y.) 255.

²¹ *Binnard v. Spring*, 42 Barb. 472.

²² *Roth v. Schloss*, 6 Barb. 310.

wrong, held that it was discretionary in the case, and so not reviewable.²³ And where a case was on trial for the third time, it was held that it was discretionary with the court to allow amendment while the trial was progressing, unless in a case where the discretion itself is improperly exercised.²⁴

The refusal of a judge to allow a defendant who has pleaded *nul disseisin* and payment, to a writ of entry to foreclose a mortgage, to amend at the trial by a disclaimer, is held not reviewable in Massachusetts.²⁵ And so, in regard to striking out an item of debt or credit in a bill of particulars,²⁶ or in an action of trespass in regard to an amendment describing the close, and inserting a venue.²⁷

§ 736. No exception lies to the refusal of a judge to order a specification of the encumbrances forming the basis of an action upon the covenants of a deed, this being entirely discretionary.²⁸ And on the other hand, the court may, in its discretion, require a party adducing a deed in evidence to introduce with it a plan therein referred to.²⁹

§ 737. In Maine, the direction of juries has been held at least largely discretionary. And the court said, in an early case, "It is the right and duty of a judge to superintend and direct as to the course of proceedings; to decide which jury shall try a

²³ Looney *v.* Looney, 116 Mass. 286.

²⁴ Volte *v.* Newbery, 17 Ind. 189.

²⁵ Iron Works *v.* Woodruff, 8 Gray, 447.

²⁶ Bruce *v.* Fairbanks, 12 Cush. 273.

²⁷ Moodey *v.* Hinkley, 34 Me. 200.

²⁸ Blake *v.* Everett, 1 Allen, 248.

²⁹ Bennett *v.* Clemence, 6 Allen, 10.

particular cause, or discharge them, at his pleasure, when they cannot agree; to make all requisite arrangements, according to his sound discretion; to excuse jurors when he thinks proper, or call a juror from one jury to another. It belongs to him, in his discretion, to do all these things, and we are by no means certain that such an order or proceeding as forms the ground of this objection is a proper subject of exception, and open to revision and correction by the whole court. At least, these seem to be rather matters of judicial discretion than matters of law.”³⁰

§ 738. It is a matter of discretion with the court to receive or reject a plea *puis darrein continuance*, which alleges matters that arose before the last continuance.³¹

§ 739. The order of admitting evidence is within the discretion of the court, and if evidence is admitted requiring further evidence to make it competent, this cannot be objected to, unless it appears that the other evidence was not introduced afterwards.³² And so the order in which witnesses are to be examined, and the number a party may call to a single point, are wholly discretionary.³³

§ 740. Cross-examination is largely under the discretion and control of the court as to its extent, as also re-examination.³⁴ And cross-examination may be restrained wholly as to immaterial matters,³⁵ and

³⁰ Ware v. Ware, 8 Greenl. (Me.) 52.

³¹ Cummings v. Smith, 50 Me. 568.

³² Wharf Co. v. Prescott, 4 Allen, 23.

³³ Cushing v. Billings, 2 Cush. 158.

³⁴ Kendall v. Weaver, 1 Allen, 277.

³⁵ Hutchinson v. Inhab. &c. 1 Allen, 33.

closely limited on collateral matters having no direct bearing upon the issue; as, for example, the degradation of a witness.³⁶

§ 741. Where it is desired to recall a witness to give him an opportunity to testify to a fact which he had intended to state in the first place, it is held, in New York, to be within the discretion of the court to allow it or not.³⁷

And so, after a case is closed, whether any more evidence shall be introduced, is entirely subject to the discretion of the court,³⁸ and that even before the argument has commenced.³⁹ And so, after the defendant's evidence is closed, a court may, in its discretion, admit evidence which does not tend to rebuttal, and this is not subject to review.⁴⁰ And even after the commencement of the plaintiff's closing argument, a defendant may be permitted to introduce evidence to explain entries, then first pointed out by the plaintiff, in books previously put into the case by the defendant.⁴¹ But it may be rejected as well as admitted, and the rejection will not be reviewed,⁴² and even in a capital case.⁴³

§ 742. In Massachusetts, it is held that no exception lies to the decision of a judge of the Superior Court, as to whether the jury shall be allowed to take a deposition with them, when they retire to make up

³⁶ *Commonwealth v. Savory*,
10 Cush. 537.

³⁷ *Law v. Merrills*, 6 Wend. 144.
276.

³⁸ *Welsh v. People*, 17 Ill. 222.
339.

³⁹ *Reed v. Anderson*, 12 Cush.
481.

⁴⁰ *Ray v. Smith*, 9 Cush. 141.

⁴¹ *Smith v. Merrill*, 9 Cush.

⁴² *Marble v. Keyes*, 9 Cush.
144.

⁴³ *Commonwealth v. Downer*,
4 Allen, 297.

their verdict,⁴⁴ or other papers or documents in evidence.⁴⁵

§ 743. Where a plaintiff has put in an auditor's report in his favor, and rested his case, it is for the court to determine at discretion whether he shall be allowed, at the close of defendant's evidence, to put in additional testimony in support of it.⁴⁶ And how many times a question may be repeated on cross-examination, and how far the witness shall be compelled to answer, are discretionary matters.⁴⁷ And so of matters in rebuttal, to corroborate the plaintiff's testimony.⁴⁸

§ 744. Where a plaintiff has put in an auditor's report as evidence, and the defendant objects to it, the plaintiff may be allowed to withdraw the report from the consideration of the jury.⁴⁹

§ 745. It is in the discretion of the court to refuse permission to the defendant in opening his case to comment on the plaintiff's evidence already introduced.⁵⁰

§ 746. Where, in a criminal prosecution, the defendant examined a letter, which the district attorney offered to read in evidence, and said he had no objection to its being read, but, after the district attorney began to read it, he objected to its admission, the judge refused to stop the reading. And it was held

⁴⁴ *Whitehead v. Keyes*, 3 Allen, 495.

⁴⁵ *Burghardt v. Van Deusen*, 4 Allen, 378.

⁴⁶ *Lowe v. Pimental*, 115 Mass. 44.

⁴⁷ *Demeritt v. Randall*, 116 Mass. 331.

⁴⁸ *Huntsman v. Nichols*, 116 Mass. 521.

⁴⁹ *Hayes v. Kelley*, 116 Mass. 300.

⁵⁰ *Rich v. Jones*, 9 Cush. 336.

by the appellate court that this matter was purely discretionary, and not subject to exception.⁵¹

§ 747. The question whether an auditor's report shall be recommitted, or not, is likewise a matter of discretion.⁵²

§ 748. And in a criminal case, it is held no ground of exception to refuse to allow the defendant's counsel to read to the jury the whole of the statute, upon one section of which the prosecution is based, if he is allowed to read all those parts which he contends affect the construction of that section, and to comment before the jury upon the whole statute.⁵³

§ 749. On the trial of an action brought against an officer by the owner of a horse and wagon, for seizing them while employed in the illegal transportation of intoxicating liquors, it was held the plaintiff could not except to a comparison by the judge in the way of illustration of the rights of the defendant in this case to those of an officer seizing a horse and wagon employed in a burglary.⁵⁴

And the allowance of an improper and irrelevant course of argument by counsel is no ground of exception, without showing that the jury were erroneously instructed as to the weight to be given to it.⁵⁵

§ 750. It is discretionary with the court to order several actions, founded on the same subject matter, brought by the same plaintiff against several defend-

⁵¹ *Commonw. v. Marks*, 101 Mass. 31.

⁵⁴ *Jones v. Root*, 6 Gray, 435.

⁵² *Kendall v. Weaver*, 1 Allen, 278.

⁵⁵ *Commonw. v. Byce*, 8 Gray, 461.

⁵³ *Commonw. v. Austin*, 7 Gray, 51.

ants, to be consolidated or tried together, even though the defendants employ different counsel, and the evidence in the several cases is different.⁵⁶

§ 751. Where the court refuses to return the jury to their room to find specifically upon certain questions on which they had failed, and signified their inability to answer, it is not exceptionable, unless there has been a clear abuse of the discretion exercised thereon.⁵⁷

It is also discretionary for the court to recall a jury after they have retired, and re-state the law and evidence to them, although the jury, when asked if they desired any instructions on the law, replied in the negative.⁵⁸

On the other hand, a judge may refuse to repeat instructions given before the jury retired, after he has answered a question put by the jury, who had come in for further instructions.⁵⁹

And it is within discretion for the judge to refuse to ask the jury as to the ground of their verdict, unless such refusal would violate some rule of law or established practice.⁶⁰

§ 752. Granting a review is matter of discretion at *nisi prius*,⁶¹ where there is no opinion, direction, or judgment expressed in matters of law.⁶² If the court is of opinion that the petitioner for a review has a

⁵⁶ *City of Springfield v. Sleeper, &c.* 115 Mass. 587.

⁵⁷ *Greenleaf v. R. R. Co.* 29 Iowa, 14.

⁵⁸ *Nichols v. Munsel*, 115 Mass. 567.

⁵⁹ *Nelson v. Dodge*, 116 Mass. 368.

⁶⁰ *Woollen Co. v. Goodrich*, 6 Allen, 201.

⁶¹ *R. R. v. Clark*, 45 Me. 152.

⁶² *Scruton v. Moulton*, 45 Me. 418.

substantial defence to the action upon the merits, which, by mistake or accident, and without fault on his part, he has had no opportunity of making, it may grant a review, without passing in advance upon the questions of law or fact involved in the trial of the case, and its action is not open to exception.⁶³

§ 753. Giving a plaintiff an option to remit, in case of an excessive verdict, is not exceptionable.⁶⁴

§ 754. Where a county court may grant a certificate that the cause of action arose from the wilful and malicious act or neglect of the defendant, &c., the allowance or refusal of such a certificate is ordinarily a matter of discretion, and not reviewable.⁶⁵

§ 755. The apportionment of costs is subject to the discretion of the court, and will not be reviewed, unless an abuse of the discretion is affirmatively shown.⁶⁶

§ 756. The discharge of a prisoner by *habeas corpus* cannot be reviewed.⁶⁷

⁶³ Boston City v. Robbins, 116 Mass. 313.

⁶⁴ Doyle v. Dixon, 97 Mass. 208.

⁶⁵ Soule v. Austin, 35 Vt. 515.

⁶⁶ Bush v. Yeoman, 30 Iowa, 479 ; Harvey v. Reeds, 49 N. H. 531.

⁶⁷ Wyeth v. Richardson, 10 Gray, 241.

CHAPTER X.

NEW TRIALS.

§ 757. I INTRODUCE the subject of new trials here, not because the rulings of an inferior court in relation to them are in all cases held not reviewable, but that these in some courts are held so to the full extent, and in others partially, as we shall see.

In the United States courts, a motion for a new trial is regarded as addressed to the discretion of the court, so that the decision of a court, either in granting or refusing it, is not a proper subject of exception.¹ In Michigan, the decisions of courts upon motions for a new trial, in civil cases always, and in criminal cases usually, are not reviewable in the appellate court.² In Maine, a refusal to grant a new trial is held to be matter of discretion at common law, and not subject to exceptions.³ In Vermont, it is held to be also a matter of discretion, subject to review only when there is an abuse of the discretion, the court not keeping within the limits of its authority;⁴ so that, if the court grants a new trial, its decision upon the merits is not subject to revision; yet, if it grants a new trial in a case where it has no legal

¹ *Pomeroy's Lessee v. State Bank*, 1 Wall. 597, and cases cited.

² *Jahr v. People*, 26 Mich. 431.

³ *Moulton v. Jose*, 25 Me. 85.

⁴ *Houghton v. Slack*, 10 Vt. 523.

authority to do so, it is error. On the other hand, in Illinois, the granting of a new trial is not reviewable, but the overruling of a motion for a new trial is subject to exception.⁵ In Massachusetts, if a motion for a new trial rests upon new questions of law arising in the case, the decision upon the motion may be revised in the appellate court. But if a judge were not asked to rule upon the legal effect of the evidence at the trial, he is not obliged to report the evidence for the purpose of raising such a question after verdict; and there is no other legitimate mode in that state in which the evidence can be put upon the record for the consideration of the court.⁶

In New York, a decision of the Court of Oyer and Terminer, on a motion for a new trial on the ground of insufficient evidence or irregularity, cannot be reviewed.⁷

§ 758. In Ohio, it is held that, under the code, a party cannot have a new trial upon the ground of misdirection or error in law occurring during the trial, unless the misdirection or error were excepted to during the term; so that, if a motion for new trial is continued, and thereupon no exception is filed till the next term, the omission is fatal in the appellate court.⁸

In some states a bill of exceptions is necessary to bring the motion for a new trial before the appellate court to review the decision thereon: indeed, this is

⁵ *Brookbank v. Smith*, 2 Scam. 78.

⁶ *Gas Co. v. Bean*, 1 Allen, 275.

⁷ *Hunting v. People*, 4 Parker, 331.

⁸ *Kline v. Wynn*, 10 Ohio St 230. (*Sutliff, J.*, dissenting.)

certainly the general, although not the universal, rule. In Kansas, when a motion for a new trial is filed, it becomes a part of the record, and it is not necessary to incorporate it into a bill of exceptions.⁹

In Vermont, the matter of a new trial, it seems, is brought before the Supreme Court by petition, and not by exceptions.¹⁰

In Mississippi, it seems to be necessary that it appear in the record otherwise than by bill of exceptions.¹¹

In Massachusetts, even a bill of exceptions containing all the evidence will not authorize the appellate court to set aside a verdict as against the weight of the evidence.¹² But in Illinois, the whole evidence must be set out in the bill, where there is a refusal to set aside a verdict because of the insufficiency of the evidence, and then the appellate court will review the refusal.¹³

§ 759. A motion for a new trial must state the reasons of the motion, so as to bring the matter clearly before the court below, and a mere reference to a bill of exceptions to be made thereafter is not allowable.¹⁴

§ 760. And so the bill of exceptions must show the nature of an objection made to the admission of evidence where a new trial is sought on that ground.¹⁵ And

⁹ *McCullagh v. Allen*, 10 Kan. 150.

¹⁰ *Bloss v. Kittridge*, 5 Vt. 30.

¹¹ *Sherwood v. Houston*, 41 Miss. 61.

¹² *City of Boston v. Benson*, 12 Cush. 62.

¹³ *Granger v. Warrington*, 3 Gil. 310.

¹⁴ *Shore v. Taylor*, 46 Ind. 350; *Murphy v. Wilson*, 46 Ind. 540.

¹⁵ *Cox v. Jackson*, 6 Allen, 109.

the motion must be preserved in the bill.¹⁶ And where the motion was based on the ground of newly-discovered evidence, the evidence on which the verdict was based, and the new evidence, should both be set out,¹⁷ for otherwise the court could not say but that the new evidence was merely cumulative.¹⁸

§ 761. One making a motion for a new trial may, by withdrawing the motion and waiving his leave to perfect and file his bill of exceptions, preclude himself from the right to an appeal or an assignment of errors on a bill filed by a co-defendant.¹⁹

§ 762. In Massachusetts, by statute, the court has authority, in criminal cases, to grant a new trial for other sufficient cause, shown after overruling the exceptions, or to remand the cause for the purpose, among others, of the court below hearing a motion for a new trial.²⁰

§ 763. Where a new trial has been granted at law in Mississippi, in a case where the first verdict was correct, and a bill of exceptions was taken to the grant of the new trial, and a second trial is had, and a verdict adverse to the first is rendered, the appellate court will exercise the authority to set aside the second verdict, and uphold the first.²¹

§ 764. A singular point arose in an important libel case, in New York, where objection was made to the re-trial of the cause before the same judge who tried

¹⁶ *Watson v. Pierce*, 11 Mo. 358.

¹⁷ *Sanders v. Lay*, 45 Ind. 229.

¹⁸ *Clark v. Hall*, 10 Kan. 80.

¹⁹ *Makepeace v. Davis*, 27 Ind. 353.

²⁰ *Commonw. v. Peck*, 2 Met. 428.

²¹ *Moore v. Ayres*, 5 S. & M. 310.

it before with a jury. On exception, the objection was held untenable.²²

§ 765. In Missouri, the court will not review a decision below, refusing a motion for a new trial, based on the ground that the verdict is against the weight of the evidence.²³ And it is doubtless a general rule in all the states that a verdict will only be set aside on such a ground when it is very clearly tenable thereon.²⁴

CHAPTER XI.

INCIDENTAL MATTERS WHICH ARE NOT EXCEPTIONABLE.

§ 766. WE have already seen that matters purely discretionary with the court are not subject to exceptions. There is also a considerable range of proceedings which are regarded as not reviewable, in part upon the ground of discretion, and in part upon other grounds, sometimes not clearly definable.

It is a general rule that there must be some intervening action of the court below, so that, where there has been no ruling at all, or none which became operative in the case at bar, there is generally no basis for the action of the appellate court. So, where a juror called the attention of the court to the fact that the defendant was shaking his head at the witnesses, and

²² *Fry v. Bennett*, 3 Bosw. Mo. 340, and *Jones v. Plummer*, 200. *ibid.* 456.

²³ *Irvin v. Riddlesburgher*, 29

²⁴ *Kimball v. Gearhart*, 12 Cal. 27.

asked if such conduct was proper and allowable, and afterwards, in the same case, the sheriff slipped blank forms of verdict under the door of the jury-room while the jury were in consultation, it was held that the appellate court could not pass upon such irregularities, presented merely by a bill of exceptions, reciting the acts, but not showing that any ruling of the court was asked for or had thereupon.¹ And where, on appeal to the court below, the plaintiff entered a motion that the defendant's surety on the appeal bond be required to justify, or that the defendant be required to furnish another surety, and the judge replied he would sustain the motion if the plaintiff would make affidavit to the insufficiency of the surety, whereupon the defendant excepted, and then gave another surety, the one on the bond not being in attendance, it was held there was no operative ruling or order in the case to which an exception could apply.²

§ 767. And so a harmless ruling, — one exercising no prejudice as to the final result, — even though it may be erroneous, is not exceptionable. Thus, where a judge refused to instruct a jury in a criminal case that the defendants could not be convicted on a certain count in the indictment, in consequence of the omission therein of their addition and residence, it was held that exceptions to the refusal must be overruled, it not appearing that the defendants were injured thereby.³ And where, during the progress of

¹ *People v. Torres*, 38 Cal. 142.

³ *State v. Mayberry*, 48 Me. 219.

² *Finley v. Quirk*, 9 Min. 198.

a trial, the judge stated a proposition as a rule of law in regard to the admissibility of evidence, it was held, though erroneous, to be no ground for exception, unless it appears that the party was prejudiced by it.⁴

And the rule applies also where a ruling, though material when made, becomes immaterial by the issue; as, in an action of trover, the judge refuses to instruct the jury that they are authorized (if they so find) to return a verdict against some of several defendants, and in favor of the others, but the jury finds that there was no conversion by any of the defendants;⁵ or where it is apparent that certain evidence introduced under objection had no effect upon the verdict.⁶

§ 768. In Georgia, it is held that an order of the judge of the Superior Court, directing process for the seizure of property claimed to be subject to a lien under the "steamboat law," is not such a judgment or decision as may be brought to the appellate court by a bill of exceptions, it being merely a ministerial act in commencement of a suit, like the issuing of a writ of attachment.⁷

§ 769. Where an action is prematurely brought, it may be peremptorily dismissed, and no exception will lie to the action of the court; as, for example, where a tenant at will was notified to quit on or before a certain day, and on that very day an action was brought to recover possession.⁸

⁴ *Church v. Rowell*, 49 Me. 367.

⁵ *Powers v. Sawyer*, 46 Me. 160.

⁶ *Slack v. Town of Norwich*, 32 Vt. 819.

⁷ *Bower v. Cook*, 39 Ga. 28.

⁸ *Decker v. McManus*, 101 Mass. 63.

§ 770. Where the competency of a witness depends upon the finding of a preliminary question of fact by the judge, his decision thereon cannot be reviewed in Massachusetts.⁹ And where evidence is conflicting, a court may properly refuse to give an instruction based on the assumption of the credibility of a particular witness.¹⁰

§ 771. In a joint action, a dismissal of the suit as to part of the defendants, without a finding on the issues as to them, while there is a verdict against the remaining defendants, — all being sued as principals in an unlawful transaction, — is no ground of exception; the dismissal not being injurious to those not included in the verdict, and the others being liable severally as well as jointly therein.¹¹

§ 772. A statement of the reasons for a ruling is no subject of exceptions, such a statement being wholly discretionary with the court.¹²

§ 773. In a criminal case, it is not necessary that the record states in direct terms that the prisoner was personally present at the time of the rendition of the verdict, and during all the previous proceedings of the trial, although such presence is necessary. It is sufficient for the record to show that he was present at the arraignment, and also present to receive his sentence.¹³

§ 774. And, after a plea in abatement to an indict-

⁹ O'Connor v. Hallinam, 103 Mass. 549.

¹⁰ Coombs v. Cordage Co. 102 Mass. 600.

¹¹ Mead v. McGraw, 19 Ohio St. 66.

¹² Smith v. Coe, 1 Sweeney (N. Y.) 386.

¹³ Jeffries v. Commonw. 12 Allen, 154.

ment for misnomer in omitting one of the defendant's three Christian names, and upon issue joined on a replication that the defendant was as well known by the name stated in the indictment as by the whole name set forth in the plea, evidence of a record of the defendant's name is irrelevant, and its rejection, when offered by him, is no ground of exception. But the prosecution may prove that he has been called in his absence by the name given him in the indictment, and in his presence by abbreviations thereof and by his surname. In a case of this kind the court said, "The question whether a person is as well known by one name as another is a question of reputation, of custom and usage, and not to be determined by records, nor limited to names used in his presence. The evidence of the abbreviated or familiar names by which he was addressed was either corroborative or immaterial, and its admission affords no ground of exception."¹⁴

And if a prisoner, on his trial, submits to the court the question whether a name proved is *idem sonans* with that in the indictment, and does not ask to have this question submitted to the jury, and it does not appear how the two names were pronounced, the appellate court cannot revise the decision of the court below; for said the court in such a case, "The question often depends upon pronunciation, and can only be determined by hearing the name spoken."¹⁵

§ 775. A demurrer saves itself, and is part of the record; and so no exception lies to a ruling thereon, and, if made, is not available for any purpose;¹⁶ al-

¹⁴ Commonw. v. Gale, 11 Gray, 321.

¹⁵ Commonw. v. Gill, 14 Gray, 400.

¹⁶ People v. Reagle, 60 Barb. 529.

though special grounds of demurrer may perhaps thus be brought into the record, where they do not otherwise appear.¹⁷

And a ruling on demurrer need not be assigned as a cause for a new trial, although all other grounds must be specified on such a motion.¹⁸

And where a question can be raised by demurrer in the court below, it cannot be brought to the appellate court by bill of exceptions in the absence of such demurrer; as, for example, the sufficiency of a declaration.¹⁹

In New York, a demurrer to evidence is held not to be a right of such a nature that a refusal of it is a ground for exception.²⁰

§ 776. In Maine, no exception lies to the refusal of a judge to order a nonsuit.²¹ And, in Vermont, it is held that the question of allowing a plaintiff to enter a nonsuit, or of vacating an entry of nonsuit, rests solely in the discretion of the court in which the suit is pending; and a judgment of the County Court, refusing to strike off a nonsuit which has been entered by the plaintiff in an action of account, cannot be revised by the Supreme Court on exceptions.²²

§ 777. A motion to set aside a default is held, in Maine, to be addressed to the discretion of the court, and the ruling thereon not to be reviewable.²³

¹⁷ Whitten *v.* Graves, 40 Ala. 582.

¹⁸ Gray *v.* Stiver, 24 Ind. 177.

¹⁹ Batchelder *v.* Batchelder, 466.

² Allen, 106.

²⁰ Colegrove *v.* R. R. 20 N. Y. 494.

²¹ Stephenson *v.* Ins. Co. 54 Me. 73.

²² Squires *v.* Burgess, 31 Vt.

²³ Thornton *v.* Blaisdell, 37 Me. 195.

And so, as to testimony under an inquest, in a case of default, the defendant is held, in Illinois, to be out of court, and to have therefore no right to except, but only a right to cross-examine witnesses; the only course being, in the event of improper testimony or wrong instructions, to make application for setting aside the inquisition and granting a new inquest;²⁴ and if application be made for setting aside a default itself, the determination thereon is discretionary, and not reviewable.²⁵

And more especially so if the default is entered by consent, and even where the consent is conditional; as, "if the foregoing ruling of the judge is correct, otherwise the default is to be stricken off, and the case is to stand for trial."²⁶ It is a general rule that no party can except to any proceedings of a court which occur in accordance with his request, or by his consent.²⁷

§ 778. An order setting down a cause for trial is not such a final disposition of a cause as will entitle a party complaining to bring the matter to the attention of the appellate court, upon a bill of exceptions.²⁸

§ 779. It is held, in Wisconsin, that the court may at discretion allow an amendment after verdict, set aside the verdict thereupon, and grant a new trial, where the necessity of an amendment at that stage does not result from an inexcusable negligence of the

²⁴ *Morton v. Bailey*, 1 Scam. 214.

²⁵ *Wallace v. Jerome*, 1 Scam. 524.

²⁶ *Woodman v. Valentine*, 22 Me. 401.

²⁷ *Mudgett v. Kent*, 18 Me. 349.

²⁸ *Brady v. Furlow*, 38 Ga. 108.

party; although it is required that, ordinarily, an error or insufficiency in the pleadings, discovered upon the trial, must be corrected by moving without delay for leave to amend.²⁹

§ 780. In Pennsylvania, it is held that sometimes, even in cases where error might lie to the issuing of an execution in a proper case, the appellate court will not, on exceptions, review the refusal of a judge to stay execution, "the court having a discretion in the matter which, unless greatly abused, is not reviewable."³⁰

§ 781. The refusal of a judge in a criminal trial to ask persons summoned as jurors whether they belong to an association formed for the purpose of enforcing the law under which the defendant is indicted, is no ground of exception, if the defendant's counsel disclaims any knowledge or suspicion of any such connection, and assigns no reason for making the request for such inquiry.³¹

§ 782. In Massachusetts, the order of a single judge sitting in equity, directing an issue of fact to be tried by a jury, is not open to exception.³²

§ 783. No exception lies to the decision of a judge upon the question whether there is on the face of the note in suit a manifest alteration, which requires explanation from the party producing it before it can be read to the jury, nor to his refusal to allow the jury to consider its appearance in reference to the question

²⁹ *Kennedy v. Waugh*, 23 Wis. 468.

³⁰ *Gamble v. Woods*, 53 Pa. St. 160.

³¹ *Commonw. v. Thrasher*, 11 Gray, 55.

³² *Crittenden v. Field*, 8 Gray, 621.

whether or not it was received in good faith by an indorsee who has brought an action upon it, if the only peculiarity relied on is the insertion in the body of the note, after the name of the payee, of a day of payment corresponding with the last day of grace, according to the time previously stated therein for the note to run.³³

§ 784. In New Hampshire, it is held that if a question of the sufficiency of a notice required by the rules of the court depends upon the matter of distance, and it be settled by the court upon affidavits exhibited at the trial, the appellate court will not, upon exceptions, revise the decision thereon.³⁴

§ 785. The submission of a legal question, such as the construction of a written instrument, affords no ground of exception, if they decide it aright;³⁵ and more especially if this was done at the exceptor's own request.³⁶

§ 786. Where there is an assessment of land damages brought by certificate to the Superior Court, and the officer presiding over the proceedings of the assessment by jury certifies with the verdict a decision by himself, in a formal way, by a bill of exceptions, which bill, without any adjudication upon the verdict, is allowed by the judge of the Superior Court, this is not such a bill as can be entertained in the appellate court, whose function it is merely to review the rulings of the court immediately below, and not to

³³ *Ives v. Bank*, 2 Allen, 236.

³⁴ *Kent v. Tyson*, 20 N. H. 121.

³⁵ *Goodnow v. Davenport*, 115 Mass. 570.

³⁶ *Randon v. Toby*, 11 How. (U. S.) 519.

pass by this, and look into the proceedings of a still inferior tribunal.³⁷

In Vermont, however, it is held that proceedings not according to the course of the common law, as road cases, and proceedings to assess land damages, where the land is condemned for a railroad, cannot be brought up on exceptions, even from the immediate lower court.³⁸ The mode of bringing such to the notice of the appellate court is by *certiorari*.³⁹ And likewise in Maine.⁴⁰

§ 787. Where a matter of fact is left to the court alone, without a jury, the decision thereon is not reviewable.⁴¹ And not even if it goes through the form of taking the verdict of a jury, where a case is submitted on a statement of facts, by the terms of which the court is to render judgment for one party or the other, thus leaving only an issue of law, and the judge rules that on the facts as agreed the plaintiff was not entitled to recover.⁴² And it seems to be held, in Illinois, that "no exceptions can be taken to the final judgment of the court, where a jury is dispensed with, even under an agreement of parties that both or either party shall have the same right to except as if the cause were tried by a jury," the court holding that there could be no misdirection on a point of law where there is no jury. But probably if, in a trial by the court, there was manifestly injustice done by

³⁷ *Tucker v. R. R.* 116 Mass. 124.

³⁸ *Courser v. R. R.* 25 Vt. 476.

³⁹ *Lyman v. Burlington*, 22 Vt. 131.

⁴⁰ *Commissioners v. Spofford*, 30 Me. 456.

⁴¹ *Hoar v. Goulding*, 116 Mass. 132.

⁴² *Haas v. Harrington*, 116 Mass. 135.

admitting improper testimony, or rejecting proper evidence, such rulings would be reviewed.⁴³

In Massachusetts, the decision of a single judge may be reviewed on matter of fact by the whole court, if he reports the whole evidence, which, in his discretion, he may refuse to do.⁴⁴

In Vermont, it is held that the finding, where an issue of fact is tried without a jury, can only be reviewed where the whole testimony is legally and clearly insufficient to support the judgment.⁴⁵

In Connecticut, a decision in this way is not reviewable, unless some question of law arises thereon.⁴⁶

In Maine, on a petition for a review, if the judge should find the facts not proved as set out in the petition, no exception lies. But if he should find the facts proved, a refusal to grant the review is exceptionable.⁴⁷

In questions of mixed law and fact passed upon by a court alone, specific rulings must be asked for, or there will be no basis for exceptions on the ground of mistake in law.⁴⁸

In Iowa, the finding of a court as to fact will be reviewed if the whole testimony is brought up, and it is claimed that the evidence does not support the judgment. And where the testimony is reduced to writing, and signed by the judge, the writing will be treated as a bill of exceptions.⁴⁹

⁴³ *Doe, ex dem. v. Spragins*, 1 Scam. 331.

⁴⁴ *Stearns v. Fisk*, 18 Pick. 24.

⁴⁵ *Emerson v. Young*, 18 Vt. 603.

⁴⁶ *R. R. v. Kay*, 22 Conn. 607.

⁴⁷ *Sturtevant v. Randall*, 49 Me. 446.

⁴⁸ *Kettell v. Foote*, 3 Allen, 213.

⁴⁹ *Snell v. Kimmell*, 8 Clarke (Iowa) 282.

§ 788. Preliminary matters are largely in the discretion of a court. And so the action of a judge refusing to order further specifications will not readily be reviewed.⁵⁰ And so where exceptions were taken on a preliminary question of present insanity as to a trial under an indictment, it was held the exceptions could not be entertained.⁵¹ And so in regard to the question of the competency of a witness on the ground of his religious belief.⁵²

And, in Vermont, it appears that the disallowance of exceptions, taken during the progress of a criminal trial, being discretionary, cannot be revised by the Supreme Court.⁵³

§ 789. Ordinarily, no exception to the Supreme Court lies to the decision of a justice of the peace. But, in Maine, this is sometimes allowable, it appears.⁵⁴ Nor in Rhode Island do exceptions lie to the rulings of a special Court of Common Pleas to the Supreme Court.⁵⁵ Nor do exceptions lie to the rulings of Orphans' or Probate Courts at common law.⁵⁶ Decisions of county commissioners, and the rulings of a court on appeal thereon, can only be reached by *certiorari*, and not by exceptions.⁵⁷ And so the adjudication of a judge of the District Court

⁵⁰ Gardner v. Gardner, 2 Gray, 439.

⁵¹ Freeman v. People, 4 Denio (N. Y.) 24.

⁵² Commonw. v. Hills, 10 Cush. 530.

⁵³ State v. Herbert, 1 Williams (Vt.) 595.

⁵⁴ Simpson v. Wilson, 24 Me. 438.

⁵⁵ Stoddard v. Winsor, 3 R. I. 148.

⁵⁶ Mayhew v. Soper, 10 Gill & Johns. (Md.) 366.

⁵⁷ Banks v. Commissioners, 29 Me. 288.

in Maine, as to the facts in a trustee process, is conclusive.⁵⁸

§ 790. At common law, no bill of exceptions lies in cases of treason and felony. And, in the United States Courts, none lies in any capital case.⁵⁹

§ 791. It is the general rule that an appellate court will not review a verdict merely on exceptions, without a motion for a new trial, on the ground that the verdict is against the evidence;⁶⁰ for exceptions lie only to the rulings of the judge, and not to errors of the jury.⁶¹

CHAPTER XII.

MATTERS AS TO EVIDENCE AND INSTRUCTIONS WHICH ARE NOT SUBJECT TO EXCEPTION.

§ 792. No exception lies to the action of the court below in admitting material evidence after the testimony is closed, under such restrictions as would prevent injustice to the opposite party.¹ Nor, on the other hand, to the refusal of a judge to allow a party to introduce evidence in corroboration of his previous proof, after the other party has offered rebutting evidence.² And even in a capital case it is discretionary with the court to admit additional evidence after the

⁵⁸ *Fletcher v. Clarke*, 29 Me. 485.

⁵⁹ *U. S. v. Gilbert*, 2 Sumner, 104.

⁶⁰ *Harmon v. Harmon*, 61 Me. 224.

⁶¹ *Stanley v. Webb*, 21 Barb. 148.

¹ *Sprague v. Craig*, 51 Ill. 288.

² *Corey v. Janes*, 15 Gray, 543.

argument of the case has proceeded, the legal right to introduce further evidence not existing at that stage. But the court may grant the right, and especially when the evidence offered is newly discovered, when there has been no laches in reference to it, and when the evidence is of a character so material in its bearing on the case as to require the court to depart from the ordinary course of proceeding in trials by jury, at the hazard of calling the attention of the jury from the evidence properly introduced, and upon which the argument has been made. A motion of this character, in any event, is addressed wholly to the discretion of the court, and its decision is final, and not a matter of exception to the ruling, as error in matter of law.³ Evidence may be allowed in rebuttal to corroborate the plaintiff's testimony in chief, and the defendant cannot except to its admission.⁴

§ 793. The regulation and restriction of evidence are also largely within the discretion of the court; as, for example, where, in a trustee process, under Mass. Stat. 1839, c. 107, § 1, a presiding judge has admitted a deposition instead of the oral testimony of the witness, no exception lies to the restriction of any subsequent examination of the witness to such facts as would tend to rebut the evidence of the party who caused the deposition to be put in.⁵ And so a judge may in his discretion limit the number of witnesses to be examined on a collateral issue, such as the charac-

³ *Commonw. v. Dower*, 4 Allen, 300.

⁵ *Hodgkins v. Pearson*, 16 Gray, 384.

⁴ *Wright v. Foster*, 109 Mass. 57.

ter of the plaintiff, or that of a witness in the cause; and this discretion may be exercised either by laying down a rule at the commencement of the examination limiting the number of witnesses to be called on each side, or by interposing and arresting the further examination, when, in the opinion of the judge, the inquiry as to character ought not to be carried further. The decision of the court in this regard cannot be reviewed on a bill of exceptions, but only on a motion for a new trial.⁶ And especially is a severe restriction in this regard necessary in an action of slander. The Supreme Court of New York say on this point, "The limitation of impeaching and sustaining witnesses to three on a side in this case, looks, to a person unacquainted with such trials, like depriving the parties of a right. But the surrounding circumstances would enable the judge at the circuit to perceive whether any benefit would result from an increase of the number. There is, perhaps, nothing in which a defendant, in an action of slander, is more likely to err than in his judgment of the necessity of impeaching the character of the plaintiff, or of his principal witness. The pleasure he derives from hearing others assail a character which he has aspersed blinds him to the consequences which often result from an indiscreet or needless attack. If the character of a witness or party is in truth bad, it can be shown by a few witnesses as well as by many. If the character is shown to be bad from the transaction itself, as when he is an accomplice of a villain, or when, on cross-examination, he exhibits himself to be a villain, general evidence

⁶ *Nolton v. Moses*, 3 Barb. 34.

of bad character will add nothing to it. There is, perhaps, no part of circuit experience in which so great abuse exists of what the law permits to be done for the discovery of truth, as is exhibited in examinations into general character, and it would become intolerable were it not restrained by the presence and power of the presiding judge."

On cross-examination, a court may restrict the application of memoranda therein elicited.⁷

§ 794. No exception lies to the rejection of evidence only partly admissible; as, for example, where two cases are tried together, and the evidence is admissible in one of them, but inadmissible in the other.⁸ And, on the other hand, if exceptions are taken to the admission of evidence on the ground of irrelevancy, if there be a single point to which it is properly applicable, the exceptions will not be sustained.⁹ And where an objection is true in part, but not true to the extent alleged in regard to the evidence, the court is not bound to examine whether it is true in part, but may overrule it altogether.¹⁰

And if, on examination of interrogatories proposed by one party in an action, to be answered by the other on oath, any of them seems irrelevant, the judge may order it expunged, and his order cannot be excepted to.¹¹

§ 795. Where contradictory evidence is admitted relating to testimony of the adverse party apparently

⁷ *Brooks v. Goss*, 61 Me. 315.

¹⁰ *Bullard v. Lambert*, 40 Ala.

⁸ *Phillips v. Hoyle*, 4 Gray, 208.
568.

¹¹ *Elliott v. Lyman*, 3 Allen,

⁹ *Moody v. Sabin*, 9 Cush. 505. 110.

concerning the same transaction, but which afterwards appeared to be connected with a different transaction, this affords no ground of exception, unless it affirmatively appears that the jury were not instructed to disregard it.¹²

§ 796. As to leading questions, they are largely within the discretion of the court to allow or disallow. And the same discretion exists to receive or reject the answers to leading questions in a deposition as in an oral examination on the trial.¹³

§ 797. It is not a matter to which defendants can except, that, in an action on the case, they were examined, and, in response to a question, went beyond in the answer, and stated matters which in themselves were irrelevant, and yet prejudiced their case before the jury.¹⁴

§ 798. No exceptions lie to the admission of witnesses who have not obeyed the order of the court excluding them from the court-room until called to testify.¹⁵

§ 799. Where a plaintiff introduces evidence of an offer to compromise made by the defendant, and the judge, on hearing the evidence, pronounces it inadmissible, and instructs the jury to disregard it, the defendant cannot except to its admission.¹⁶

§ 800. As to immaterial evidence, its admission, when harmless, is no ground of exception; nor the admission of hearsay evidence on an immaterial point;¹⁷

¹² *Randall v. Doane*, 9 Gray, 408.

¹³ *Bliss v. Shunam*, 47 Me. 253.

¹⁴ *Streeter v. Evans*, 44 Vt. 33.

¹⁵ *Commonw. v. Hall*, 4 Allen, 305.

¹⁶ *Batchelder v. Batchelder*, 2 Allen, 106.

¹⁷ *Beatty v. Sylvester*, 3 Nev. 228.

or immaterial questions on cross-examination.¹⁸ And where an answer makes a question immaterial, no exception can be sustained to the question.¹⁹

§ 801. If account books be improperly admitted in evidence, and afterwards the opposing party requests that they go to the jury to prove a fact favorable to himself, he thereby waives his right to object to the admission thereof.²⁰

And no exception lies, on the other hand, to the rejection of an account book, partly on inspection of the book by the judge, and partly on specific objections of the opposite party.²¹

§ 802. In regard to secondary evidence, it was held, in a case where a life-insurance company brought an action on a note, and the defence was set up of a want of consideration, and thereon the defendant offered evidence to prove the contents of the policy in his own possession, without showing its loss, which the court rejected, and the defendant submitted to a verdict for the plaintiffs, that the defendant could not allege in the appellate court that the evidence offered by himself was immaterial, or except to the ruling excluding the parol evidence.²² The admission of parol evidence conforming to the legal interpretation of a deed is not exceptionable, since such evidence is immaterial.²³

And on a trial to determine the validity of a con-

¹⁸ *Fowler v. County Commissioners*, 6 Allen, 96.

¹⁹ *Flanders v. Davis*, 19 N. H. 139.

²⁰ *Ward v. Abbott*, 14 Me. 275.

²¹ *O'Brien v. Barry*, 4 Gray, 605.

²² *Ins. Co. v. Chapman*, 6 Gray, 73.

²³ *Crittenden v. Field*, 8 Gray, 629.

tract of sale, under which the plaintiff claims title to a chattel, the defendant cannot except to the discretionary act of the judge in permitting the plaintiff to modify his own testimony, and introduce further evidence to show that a paper delivered to him by the seller at the time of the transfer was merely a bill of parcels, although the plaintiff had previously testified that it was a bill of sale, and that he had it in possession, and the defendant had called for its production, the court holding that it was necessary that some inquiry should be made as to its contents in order to ascertain whether it was a formal bill of sale, which ought to be produced, or a mere bill of parcels, which needs not be produced.²⁴

§ 803. In a real action, if deeds are introduced in evidence under a proposal of the defendant to connect his title therewith, which he afterwards fails to do, the plaintiff cannot except to the admission, the result having made it wholly immaterial.²⁵

And the admission of other proof of the execution of a deed is no ground of exception by a party who subsequently calls and examines the subscribing witness for a similar reason.²⁶

§ 804. While the essential qualifications of an expert are determinable only by the rules of law, the possession of those qualifications by any one offered as an expert witness is exclusively for the court to determine, and no exception lies to a ruling thereon.²⁷

§ 805. A bill of exceptions will not lie to a refusal

²⁴ *Mullen v. Kavanagh*, 101 Mass. 352.

²⁵ *Webster v. Calden*, 55 Me. 170.

²⁶ *Commonw. v. Castles*, 9 Gray, 121.

²⁷ *Dole v. Johnson*, 50 N. H. 459.

to strike out evidence received without objection. The remedy in such a case is to ask the court to charge that the evidence be disregarded; on which request a refusal of the court is reviewable.²⁸ *

§ 806. Whether a witness has sufficient knowledge of right and wrong, and of the nature and obligation of an oath, is wholly discretionary with the judge to determine, so long as no erroneous view is taken of any legal principle.²⁹

§ 807. A bill of exceptions must be overruled, which only shows that the defendant offered to prove that an award is erroneous, without showing the particular errors relied on therein.³⁰

§ 808. To a certain extent, a comment on the evidence by the court is not open to exception. And even where it goes to the length of expressing an opinion that it is insufficient to support the action, if, on plaintiff's request, a special verdict is taken, whereon the jury find adversely to him in a matter essential to his case, whereby the comment of the judge is rendered immaterial, no exception lies.³¹ In order to render such comments exceptionable, it must appear that the expression was such as to be likely to create the impression in the minds of the jury that the court intended wholly to exclude the evidence from their consideration, and that such evidence had a legal tendency to prove the issue.³² A judge may

* In some states, It is not the general rule, I judge.

²⁸ *Oswald v. Kennedy*, 48 Pa. St. 13.

²⁹ *Commonw. v. Mullins*, 2 Allen, 295.

³⁰ *Hubbell v. Bissell*, 2 Allen, 197.

³¹ *Insurance Co. v. Buffum*, 2 Gray, 550.

³² *Sawyer v. Phaley*, 33 Vt. 69.

express his opinion in the way of advice, if he gives the jury distinctly to understand that they are to exercise their own judgment in passing on the evidence.³³ And so suggestions as to the inconclusiveness of the evidence on a particular point is proper under the statute in Maine.³⁴ But the comment must not involve any opinion or direction in matter of law.³⁵ And it was held in a suit against underwriters, to recover on a policy for the loss of bank bills on a vessel, that the remark of the judge to the effect that, in the absence of fraud, the amount insured in the policies had some slight tendency to prove the amount of the bills on board, stated no legal proposition, and gave no direction on any point of law, and was, therefore, not subject to exception.³⁶ And yet it has been held, in Massachusetts, that a new trial may be granted if the opinion expressed on the evidence is incorrect, where the party against whom the opinion operates yields to it without arguing against it.³⁷ And a judge may, in Maine, express the opinion that certain portions of plaintiff's evidence have no tendency to establish the issue of fraud.³⁸

§ 809. As to directing a verdict, that can only be done when the evidence is not conflicting, and clearly establishes the issue for the defendant.

The court may refuse to direct the verdict, if there be any evidence, however slight, which may legally justify a verdict for the plaintiff.³⁹

³³ Crawford *v.* Wilson, 4 Barb. 517.

³⁴ Loud *v.* Pierce, 25 Me. 241.

³⁵ Davis *v.* Jenney, 1 Met. (Mass.) 221.

³⁶ Whitney *v.* Ins. Co. 2 Met. (Mass.) 8.

³⁷ Curl *v.* Lowell, 19 Pick 27.

³⁸ Dyer *v.* Greene, 23 Me. 469.

³⁹ Smith *v.* Collins, 115 Mass 398.

§ 810. Where the evidence shows, as stated in a bill of exceptions, that a plaintiff is not entitled to recover, the appellate court will not consider the rulings of the court below.⁴⁰

§ 811. The refusal of a judge to instruct the jury that they ought not to convict upon the uncorroborated testimony of a witness whose reputation has been, in the case on trial, proved to be bad, is not subject to exception.⁴¹

§ 812. Immaterial instructions furnish no ground of exception; as where the immateriality arises from the final result,⁴² or a ruling excluding evidence bearing only on the amount of damages, where it is not claimed that the damages are excessive.⁴³ So where the instruction bears upon a matter whence the exceptor derives no rights.⁴⁴ And where plaintiffs request instructions, which are refused, and the jury find they have no title to the property sued for.⁴⁵

And a part of an instruction, erroneous in itself, but nullified by correct instructions, is not a ground of exception.⁴⁶

And where a case has been given to the jury on special instructions, and on the jury failing to agree those special instructions have been withdrawn, and the jury are charged to find for the defendant, and they find accordingly, no exceptions will lie to the special instructions, they having been superseded.⁴⁷

⁴⁰ Jones *v.* Graham, 24 Ala. 451.

⁴¹ Commonw. *v.* Bosworth, 6 Gray, 479.

⁴² State *v.* Murphy, 61 Me. 56. 128.

⁴³ Moody *v.* Inhab, &c., 61 Me. 264.

⁴⁴ Beeman *v.* Lawton, 37 Me. 546.

⁴⁵ Walker *v.* Blake, 37 Me. 373.

⁴⁶ Oxnard *v.* Swanton, 39 Me.

⁴⁷ Kelley *v.* Hendril, 26 Mich. 255.

And a refusal to give an instruction, sound in law, but inapplicable, cannot be excepted to,⁴⁸ even when a jury come in without agreeing, and a defendant claims to have been prejudiced by the refusal.⁴⁹

§ 813. Nor can a party except to an omission to give a definite instruction which was not requested.⁵⁰ Nor to a refusal, on a murder trial, to instruct the jury that, on the evidence, another person had an equally strong motive with the prisoner to commit the alleged crime.⁵¹ Nor to the refusal of instructions offered by the adverse party.⁵² Nor to incorrect instructions, asked for by himself.⁵³ Nor to evidence introduced by himself, nor to instructions based thereon too favorable to him.⁵⁴ Nor to instructions not given verbatim, but substantially as requested.⁵⁵ Instructions requested may be modified, or have explanatory clauses attached by the court, and if they then express the law, they are not exceptionable, because not given in the form requested.⁵⁶ And even where the language of an instruction by the court is not critically exact, yet if it is evident that the principle intended to be expressed is a correct one, and if the attention of the judge was not called to the inaccuracy at the time, it is not open to exception.⁵⁷

⁴⁸ Norton v. Kidder, 54 Me. 193.

⁴⁹ Foote v. Foote, 13 Allen, 412.

⁵⁰ Gardner v. Gooch, 48 Me. 487.

⁵¹ Commonw. v. Dower, 4 Allen, 297.

⁵² Bailey v. Campbell, 1 Scam. (Ill.) 47.

⁵³ West v. Lynn, 110 Mass. 518.

⁵⁴ Nixon v. Hammond, 12 Cush. 285.

⁵⁵ Burton v. March, 6 Jones (N. C.) 409.

⁵⁶ Abbott v. Stirblen, 6 Clarke (Iowa) 197.

⁵⁷ Ray v. Lipscomb, 3 Jones, 185.

§ 814. Where a jury returned into court and reported that they were not able to agree as to the guilt of a prisoner, and the foreman informed the court that there was no prospect of an agreement, and asked whether a juror had a right to set aside the provisions of the statute against the sale of ale because the city government had permitted persons to sell it, there being but one dissenting jurymen, and the court instructed the jury that they could not disregard any of the provisions of the statute which prohibited, not only the sale of ardent spirits, but also of ale; that both the rights of the defendant and the interest of the public required that these cases should be terminated; and that, while no juror should render a verdict against his convictions, it was a fact for any dissenting juror's consideration that his associates differed from him, — it was held that there was no ground for exception by the defendant.⁵⁸

§ 815. In Massachusetts, exceptions do not lie to judgments on a plea in abatement, nor instructions to a jury in regard thereto.⁵⁹

§ 816. It is no ground for a bill of exceptions that a court refuses to instruct a jury on a point of law so stated as to involve a question of fact; as where an opinion is requested "under the circumstances of the case," which are not as yet found as facts.⁶⁰

§ 817. In certain cases, no exception lies to referring the determination of a matter in part to the experience of a jury; as, for example, in a suit against

⁵⁸ *Commonw. v. Whalen*, 16 Gray, 25.

⁶⁰ *U. S. v. Burnham*, 1 Mason, 57.

⁵⁹ *Sawyer v. Pratt*, 9 Met. 170.

the drawer of a bill of exchange drawn for his accommodation, where the defence was, that the bill had been altered so as to be payable in sixty days, instead of six days, and the only evidence of alteration was on the face of the bill, and the judge first instructed the jury that the question was to be decided on inspection, and then that they might consider the probability or improbability that an accommodation bill would be made payable in six days. It was held that the instruction was not open to exception.⁶¹

§ 818. A party cannot except to the remark of the court in charging the jury, which appears to have been favorable to his case, and could not be prejudicial to him, even although the remark was irregular, and indicated the private opinion of the judge.⁶²

§ 819. In a penal action, no exception can properly be taken to the refusal of the judge to instruct the jury that the evidence to justify a conviction must be at least equal to the testimony of one unimpeached witness, when, instead thereof, he instructs them that the evidence must be such as to satisfy them, beyond any reasonable doubt, of the defendant's guilt.⁶³

⁶¹ *Davis v. Jenney*, 1 Met. (Mass.) 221.

⁶³ *Commonw. v. Tuttle*, 12 Cush. 504.

⁶² *McDougall v. Shirley*, 18 N. H. 108.

CHAPTER XIII.

EXCEPTIONS TO EVIDENCE.

§ 820. A GENERAL objection merely goes to the competency of evidence, and not to the order of time in which it is to be introduced, as whether on cross-examination or not. When the latter point is the basis of the objection, the attention of the court, and of the opposite party, should therefore be called to it by a specific objection, so that the defect, if any exist, may be obviated. And a wider range may properly be allowed in the cross-examination of a party than of another witness.¹

§ 821. In Ohio, the statute allowing exceptions for the purpose of reviewing on error the issues of fact, or the weight and sufficiency of the evidence, does not apply to proceedings before justices of the peace, wherein exceptions will lie under the statute only to questions touching the competency or relevancy of evidence.²

§ 822. A bill of exceptions must clearly set out the circumstances of the rejection of evidence offered. And a defendant, to avail himself of an exception to the refusal of the court to allow him to introduce certain testimony, must have offered it before he rested the defence, or it must clearly appear that the testimony offered was in answer or rebuttal to the evi-

¹ Knapp v. Schneider, 24 Wis. 70.

² Ohio ex rel. v. Wood, 22 Ohio St. 538.

dence of the plaintiff after the plaintiff had resumed the case.³ It must be shown what was proposed to be proved,⁴ where the objection is to the matter of the evidence, and not merely to the competency of a witness.⁵ And its materiality and relevancy must appear, for otherwise the appellate court could not determine whether it was properly excluded or not.⁶ And so, where a bill showed an exception to the ruling of the judge in refusing to allow a letter of the defendant to be read in evidence, but did not set out the contents of the letter, the exception was held unavailing, because the court could not know whether the contents were relevant to the issue or not.⁷ And that an improper question was allowed, on the other hand, to be asked, is not available, if it does not appear what the answer was, the rule being applicable as well to admission as to exclusion.⁸ And so a question must be shown, or the appellate court cannot say whether the circuit court erred in refusing to allow the witness to answer it.⁹

And the grounds of rejection must be set out in relation to a rejected deposition; and where a bill of exceptions merely stated the offering and rejection of a deposition, but did not state whether the rejection was on the ground of interest in the deponent, informality in the caption, irrelevancy, or other cause, it was held unavailing.¹⁰

³ *Speyer v. Stern*, 2 Sweeney (N. Y.) 516.

⁴ *State v. Staley*, 14 Min. 114.

⁵ *State v. Jim*, 3 Jones (N. C.) 348.

⁶ *Street v. Bryan*, 65 N. C. 619.

⁷ *Sewell v. Eaton*, 6 Wis. 490.

⁸ *Church v. Drummond*, 7 Ind.

17.

⁹ *Warner v. Manski*, 17 Ill.

234.

¹⁰ *Comstock v. Smith*, 23 Me.

202.

§ 823. In regard to the admissibility of a dying declaration, it is held, in North Carolina, — and this doubtless is the general rule, — that such a declaration is admissible only as to those things of which the declarant would have been admitted to testify, if sworn as a witness in the case; and if it is not the statement of a fact, but only of an opinion, it is to be excluded; as where the deceased was shot at night in a house from the outside, and *in extremis* he declared, "It was A who shot me, though I did not see him," this declaration was held properly rejected as evidence. And the decision of a judge in regard to the admissibility of a dying declaration is held to comprise a decision of both fact and law, — fact, as to what the declaration was, and as to the circumstances thereof; and law, as to whether it is competent testimony, either alone or in connection with the circumstances. On the former the decision is not reviewable, although on the latter it is so.¹¹

§ 824. It is imperative that a bill of exceptions set out a brief of the oral testimony, and a copy of the written; the latter either inserted or so clearly connected by reference as to be readily identified. The better practice is to insert the documentary or other evidence;¹² and all the evidence relating to the point assigned as error must be so included or referred to.¹³ If, however, a written document is already a part of the record legitimately, it needs not be recopied into

¹¹ State *v.* Williams, 67 N. C. 14.

¹² White *v.* Manufacturing Co. 38 Ga. 590.

¹³ Reid *v.* Spencer, 38 Ga. 596; Linn *v.* Hoag, 30 Wis. 159.

the bill of exceptions, but may be referred to with the number of the page of the transcript. But oral evidence cannot so be referred to where the clerk has set it out in the transcript. And so the following bill of exceptions was held to present no question for the consideration of the court.

"A. B. } DECATUR CIRCUIT COURT.
v. }
C. D. } Fall Term, 1870.

"Be it remembered that, on the ——— judicial day of the fall term, 1870, of said court, the said cause came on for trial before the court without the intervention of a jury; whereupon the plaintiffs introduced the following evidence, to wit (see pages 8 to 18); and whereupon the defendant introduced the following evidence, to wit (see pages 18 to 28 inclusive); and while J. R., one of the plaintiffs, was on the stand as a witness, the defendant put to him questions one (1), two (2), three (3), and four (4), to wit (see pages 28 and 29); but the court, upon the objection of the plaintiffs' attorneys, refused to allow said questions, or either of them, to be answered; to which ruling the defendant objected and excepted at the time, and, after the evidence was all heard, made the following finding, to wit (see page 5); and whereupon the defendant filed the following motion for a new trial, to wit (for motion for new trial see page 6), which motion the court overruled, and rendered final judgment on said finding;—to all of which the defendant objected and excepted, and still objects and excepts, and asks that his bill of exceptions be signed, sealed,

and made a part of the record; which is done accordingly.¹⁴

J. M. W. (SEAL.) ”

§ 825. It is not sufficient, in regard to a written document used as evidence, that the bill of exceptions describe it as to its purport or effect. It must be set out in the bill verbatim, or else be available as an exhibit plainly referred to and identified.¹⁵ But it is held a sufficient reference if the bill states that, upon the foregoing evidence and admissions, “the written vouchers on file, and on no other evidence,” &c., even though there are uncontested vouchers also in evidence, concerning which the evidence is not set out by the bill, inasmuch as all the evidence relating to the points of contest is set out so as to be distinctly available.¹⁶

§ 826. In regard to the rule that all the evidence on which a decision complained of rests, or an instruction, it is presumed, where this is not done, that there was other evidence to justify the decision or the charge, and the judgment below must be affirmed. This is the uniform principle in all the authorities, and is a necessary corollary of the presumption that all things are presumed correct, unless error is affirmatively shown.¹⁷

§ 827. The bill must distinctly affirm that all the evidence in the case under a general exception, or all in a special part of the case under a particular exception is set out. And it has been held that a recital that, “under

¹⁴ *Stewart v. Rankin*, 39 Ind. 162.

¹⁵ *Dillard v. Parker*, 25 Ark. 503.

¹⁶ *Ivey v. Coleman*, 42 Ala. 409.

¹⁷ *Gallagher v. Brandt*, 52 Ill. 81.

the facts stated within, the court held and ordered," &c., was not sufficient to show that all the evidence is set out in the record, and this although it appears that the facts were agreed on by consent.¹⁸ And so with the recital "upon the foregoing evidence the court decided," &c.¹⁹ And where a bill merely states that a deed was offered in evidence, it has been held not to show that it was used or read in evidence;²⁰ and in such case the bill is not available.²¹ In a case wherein the bill recited that "on the trial of the cause the following evidence was before the court," the recital was held insufficient to show that all the evidence was set out.²² And, in Indiana, under a rule of court that "In every bill of exceptions purporting to set out the evidence, upon motion for a new trial, overruled, the words 'This was all the evidence given in the cause,' are to be regarded as technical and indispensable to repel the presumption of other evidence," it is settled that these words, "The following was all the evidence given to the court," do not meet the requirement of the rule.²³ And where the bill professes to set out "an outline of all the testimony in the case," it is insufficient for a general exception, or to justify an inquiry into the propriety of a refusal below to grant a new trial.²⁴

However, a condensed statement of the whole evi-

¹⁸ *May v. Lewis*, 41 Ala. 315.
(Judge J. dissenting.)

²² *Bender v. State ex rel.*
&c. 26 Ind. 286.

¹⁹ *Kirksey v. Hardaway*, 41
Ala. 330. (Judge J. dissenting.)

²³ *Chapel v. Washburn*, 11
Ind. 395 (and subsequent cases
follow this decision).

²⁰ *Page v. O'Brien*, 36 Cal.
559.

²⁴ *Buckmaster v. Cool*, 12 Ill.

²¹ *Kelley v. Union County*, 76.
23 Ark. 331.

dence, where it is oral, is sufficient, or even a statement of the tendency of evidence to prove certain facts, in Virginia.²⁵ And, in Michigan, a statement of the evidence of facts on which an instruction rests, or a statement that there was such evidence, is allowed; but these appear exceptions to the general rule.²⁶ And, in Virginia, it is held that a bill of exceptions to a decision granting or refusing a new trial, is not to set out the evidence of the witnesses examined on the trial, instead of the facts appearing to the court to be proved by such evidence, unless by rejecting the exceptor's evidence, and giving full force and credit to that of the adverse party, it still appears that the decision below is wrong.²⁷

§ 828. Where evidence is admitted, which is competent when connected with other evidence, an exception to its admission cannot be sustained unless the bill of exceptions affirmatively shows that such other evidence was not introduced, or that the evidence admitted was improperly used for a purpose for which it was not competent.²⁸

§ 829. Where a diagram is offered and rejected, it must be set out to reserve the question on the ruling.²⁹

§ 830. Where a deed is used in evidence, but not material to the points before the appellate court, both parties claiming under it, it needs not be set out in the bill.³⁰

²⁵ Forsyth *v.* Matthews, 15 Gratt. 103.

²⁶ Tyler *v.* People, 8 Mich. 320.

²⁷ Pasley *v.* English, 5 Gratt. 148; Forkner *v.* Stuart, 6 Gratt.

198. (See also 6 Gratt. 219 and 287.)

²⁸ Whitcher *v.* McLaughlin, 115 Mass. 167.

²⁹ R. R. *v.* Irish, 40 Ind. 277.

³⁰ Rugg *v.* Towner, 41 Ga. 316.

§ 831. Notwithstanding the jury may have viewed the *locus in quo*, yet the rule of all the evidence may be sufficiently complied with, as the examination of the place is only to be regarded as a measure to enable the jury properly to understand the testimony actually adduced in the case on which their verdict must be based, and not to enable them to become silent witnesses in the case.³¹

§ 832. Where failure to suppress certain parts of a deposition is assigned as a reason for a new trial, a bill of exceptions must show the motion to suppress, and also the parts of the deposition to be suppressed.³²

Where interrogatories are not necessary to render the answers intelligible, they need not be set out in a bill of exceptions.³³

§ 833. Where exceptions are taken to the exclusion of evidence to prove a set-off, the bill must set out the items of the set-off, or the court will not entertain the objection.³⁴

§ 834. Where, in an action upon a judgment rendered in another state, the bill of exceptions, taken to the admission of the record in evidence, does not embody the record itself, the appellate court will not notice it, even though a record answering the description of the one sued on is inserted in the transcript by the clerk.³⁵

§ 835. Where a bill of exceptions is taken to the admission of a deposition on the ground that it was a

³¹ *R. R. v. Bowen*, 40 Ind. 548 (overruling prior cases).

³² *Bargis v. Farrar*, 45 Ind. 41.

³³ *Carey v. Giles*, 10 Ga. 1.

³⁴ *Rankin v. Butler*, 2 S. & M. 473.

³⁵ *Wright v. Bank*, 6 S. & M. 251.

deposition not taken in the pending suit, but in another suit between the same parties, and the deposition is not set out, the verdict will not be disturbed.³⁶

§ 836. The omission of a bill to state that it contains all the evidence is not cured by an indorsement thereon by the appellee, "I am satisfied with the foregoing bill of exceptions," with his signature attached.³⁷

§ 837. Where a plaintiff has established a *prima facie* case, a ruling of the court, requiring him to produce further evidence, without the defendant's having adduced any proof, is exceptionable.³⁸

§ 838. In a probate case, tried before the court without the intervention of a jury, a recital in the bill of exceptions that the appellants "objected to the fifth volume of Porter's Reports," which was "offered and read in evidence" by the appellee, "being read for the purpose of proving any fact or facts, but the court overruled their objection, and they excepted," has been held, in Alabama, insufficient to show that the volume was read in evidence for the purpose of proving any fact or facts.³⁹

§ 839. In Iowa, it is held that, where equitable issues are tried, and the evidence is in writing, it need not be embodied in a bill of exceptions, but may be brought up merely under a certificate of the clerk.⁴⁰ And so in Georgia, documentary evidence attached to a bill as exhibits.⁴¹ In Illinois, it has been

³⁶ Wright v. Bauk, 6 S. & M. 251.

³⁷ Gas Co. v. Graham, 35 Ill. 346.

³⁸ Kent v. Willey, 11 Gray, 368.

³⁹ Bartee v. James, 33 Ala. 34.

⁴⁰ Bank v. Harvey, 16 Iowa, 141.

⁴¹ Carey v. Giles, 10 Ga. 1.

held that, in chancery, all decisions on motions, all the evidence in a cause, and the decrees, are matters of record without a bill.⁴² But, in a recent unreported case (*Brockenbrough v. Dresser*), this seems to have been suddenly overturned, and it is held that even documentary evidence cannot be incorporated into the record and copied with the transcript by the clerk in a chancery cause.

§ 840. Affidavits in support of any motion are not a part of the record until brought in by a bill of exceptions.⁴³ In this all the authorities agree, I believe, without a single exception.

CHAPTER XIV.

EXCEPTIONS TO INSTRUCTIONS.

§ 841. EVEN where instructions are required by law to be reduced to writing, they are not considered a part of the record unless brought in by a bill of exceptions, and, unless excepted to, they will not be regarded by an appellate court.¹ And a wrong refusal to give is exceptionable, as well as an erroneous instruction actually given.²

The only exception, I believe, to the necessity of a bill of exceptions, in relation to the giving of an

⁴² *Swift v. Castle*, 23 Ill. 215.

⁴³ *Garner v. White*, 23 Ohio St. 192; *Whaley v. Gleason*, 40 Ind. 405.

¹ *R. R. v. Graham*, 46 Ind. 240; *Fisher v. Allison*, 46 Ind. 593.

² *Drew v. Beall*, 62 Ill. 164.

erroneous exception, is the state of Florida, where, if the instruction is in writing, and attested by the judge, it will, if manifestly irrelevant to the issue, be passed upon by the appellate court, even if there be no bill, or, if one, yet the instruction is not incorporated therein.³

§ 842. The rule in regard to setting out instructions is the same as that in regard to setting out evidence, in this, that, under a general exception, the whole must be incorporated, and, under a specific exception, only so much as is necessary to establish the error complained of needs be stated. And, under the system of charging in vogue in the United States Courts, the latter is usually the only mode available.⁴ And, of course, an exception to a part of the charge of a judge only presents for the consideration of the appellate court the legal proposition embraced in that part so excepted to.⁵

§ 843. And where a portion of instructions only is given, the court will presume that the judge gave all other proper instructions.⁶

§ 844. In California, the distinction is drawn, that, where a party procures the giving of an instruction, the opposite party may except generally without specifying what portion is objectionable; but where an instruction is given by the court of its own motion, a specific objection must be applied.⁷ I do not see the reason of the rule, especially where the court has

³ *Fash v. Clark*, 8 Fla. 16 ;
McKay v. Bellows, *ibid.* 31.

⁴ *Stimpson v. R. R.* 3 How.
(U. S.) 553.

⁵ *Varnum v. Taylor*, 10 Bosw.
148.

⁶ *Hervey v. Nourse*, 54 Me.
256.

⁷ *Shea v. R. R.* 44 Cal. 415.

the power to modify an instruction asked, and the Supreme Court seem to intimate a doubt as to whether the practice is well founded.

And accordingly it is held that, to instructions given on the request of the opposite party, it is sufficient to except to "each and all" thereof.⁸

In Maryland, also, where a variety of distinct prayers is wholly refused by the court, and the party excepts to the refusal collectively, the court will consider the refusal in the same way as if each question raised had been separately determined, and formed the subject of an independent exception.⁹

But the general rule is, doubtless, otherwise, as stated in Alabama, that where several objections are grouped together into one exception, they will not be considered distributively, but conjointly, and all the objections must be well taken, or the whole exception must be overruled.¹⁰

§ 845. Instructions excepted to are to be considered in connection with, and construed by, the evidence, which must therefore usually be set out in the bill.¹¹ This is needful, also, to show that an instruction refused was not abstract, and so properly rejected, as having no application to the case.¹²

But it has been held that the evidence need not be set out where an instruction upon legal principles is pertinent to the issues and averments of the declaration.¹³ And when instructions actually given are

⁸ *McCreery v. Everding*, 44 Cal. 246.

⁹ *Bank v. Bank*, 10 Gill & John. 347.

¹⁰ *Ivey v. Coleman*, 42 Ala. 416.

¹¹ *Gerrish v. Manuf. Co.* 10 Foster (N. H.) 478.

¹² *Cresinger v. Lessee*, 15 Ohio, 156.

¹³ *Powers v. Bridges*, 1 Iowa (Greene) 235.

excepted to on the ground of a mistake of law, it is held, in Alabama, that the evidence need not be set out.¹⁴ And also, where an erroneous affirmative charge is given by the court, either of its own motion or at the instance of the opposite party, in which case, if a plaintiff desires to parry the effect of the error, he should cause the proof to be wholly set out, so as to show that the charge was abstract, or not misleading, or for some other cause was rendered innocuous; otherwise injury will be presumed from the error.¹⁵

§ 846. In general, however, instructions are presumed correct or harmless, unless the error is affirmatively shown; and in the same state (Alabama) as well as elsewhere; so that an affirmative charge of the court which upon any supposable state of facts would be correct, will be presumed to have been justified by the evidence, unless such presumption is rebutted by the record.¹⁶ And so a charge asked and refused will be presumed to have been abstract, unless the contrary is affirmatively shown by the record.¹⁷

And although an instruction would be erroneous unless certain evidence had been given on the trial, such evidence will be presumed unless the party excepting shows by his bill that no such evidence was given.¹⁸ And where the matter is merely left doubtful as to whether an instruction is correct or not, the presumption of correctness will usually prevail.¹⁹

¹⁴ *Thorp v. State*, 15 Ala. 749.

¹⁷ *Tuberville v. State*, *ibid.* 715.

¹⁵ *Charter v. Chandton*, 21 Ala.

¹⁸ *Day v. Raguet*, 14 Min. 274.

90. ¹⁹ *Lively v. Ballard*, 2 W. Va.

¹⁶ *Tempe v. State*, 40 Ala. 351. 496.

And if, on any probable state of facts, the instructions would be correct, the existence of such facts will be presumed; although if, on any and every state of facts, the instruction would be wrong, the presumption will be reversed, and the error will be adjudged misleading, if they seem calculated to mislead.²⁰ And where it is doubtful whether the point to which an exception applies is essential to the decision of the case, and what view the jury took of the evidence, if the instructions or rulings of the court are defective, the exception will be sustained, and a new trial granted.²¹

§ 847. It is not the province of a court to moot points of law or give opinions on abstract propositions, and therefore a bill must show the materiality or application of instructions asked and refused.²² And in a case where a judge refused an instruction framed on the assumption that a particular rule of law was applicable to the case, which rule the judge had previously instructed the jury was not applicable, without any objection being offered, while he instructed also that another rule was applicable, whereas, in reality, either rule was applicable to the evidence, as stated in the bill, which, however, did not profess to set out all the evidence, the exception was overruled because it did not distinctly appear that the instructions asked for were pertinent or appropriate.²³

§ 848. If an exception is taken to the refusal of a requested instruction, and it does not appear what in-

²⁰ *Murray v. Fry*, 6 Ind. 371.

²² *Evans v. Lohr*, 2 Scam.

²¹ *Howe v. Newmarch*, 12 Allen, 57.

(Ill.) 511.

²³ *Milk v. R. R.* 99 Mass. 167.

structions were actually given, the exception will be overruled, unless the requested instruction presented the true rule of law applicable, and lacked no qualification whatever; but it is otherwise if the refusal of the specified instructions necessarily implies that a contrary and incorrect rule was given, or that the jury were left without instructions on the point; or where the requested instructions cover the whole principle, and it is clear that the case required that the law should thus be stated, although only the requests appear in the record.²⁴ And where requests are not complied with, a refusal is implied.²⁵

§ 849. An exception to a term or phrase in a charge, where the whole tenor is correct, cannot be sustained; as, for example, to the term "peaceable," where the charge was that a possession for twenty years, under the statute of limitations, must be open, notorious, uninterrupted, and peaceable, when there was no claim that there had ever been any disturbance of the possessor.²⁶

And so as to a part of an instruction in itself erroneous, but which is, when connected with the remainder, not misleading, and other instructions on the point are clearly proper, no exception will be sustained.²⁷ And if the parts taken as a whole are not erroneous, partial error, annulled by the general correctness, is not a proper subject of exception.²⁸ And a court will look

²⁴ *Marshall v. Oakes*, 51 Me. 308.

²⁵ *Emerson v. Delamater*, 2 Blatch. 1.

²⁶ *Rayner v. Timerson*, 51 Barb. 531.

²⁷ *Oxnard v. Swanton*, 39 Me. 125.

²⁸ *Jackman v. Bowker*, 1 Met. (Mass.) 236.

into the whole record in estimating the effect of instructions given.²⁹

§ 850. In Massachusetts, under the statute of 1840, the rulings of the Court of Common Pleas on the admissibility of evidence, and their instructions to the jury on the trial of an issue joined on a plea in abatement, are held not exceptionable.³⁰ But, by statute, the instructions and rulings of that court may be reviewed on a bill of exceptions, in regard to the assessment of damages in the taking of land for widening a street.³¹

§ 851. It is held that, where an instruction is excepted to on the ground that it assumes a fact not proved, the bill of exceptions needs not point out specifically wherein it makes such assumption, as this particularity, if required, might often lead to a discussion or argument upon instructions as they were given, instead of what the law enjoins — a simple exception, and a plain statement of the grounds upon which it was made.³²

§ 852. Where a charge, incorporated into the bill of exceptions, recites facts, the recital is to be taken as true, in like manner, as the entire bill is held to import absolute verity.³³

§ 853. Where, on the margin of an instruction embodied in the record, the word "refused" was written, but the bill of exceptions recited that the instruction was given, it was held that the recital must prevail.³⁴

²⁹ Gano v. Samuel, 14 Ohio, 592.

³⁰ Bartol v. Stanwood, 7 Cush. 115.

³¹ Parks v. City of Boston, 15 Pick. 198.

³² Davis v. Strohm, 17 Iowa, 426.

³³ Vernon v. East Hartford, 3 Conn. 482.

³⁴ Keithler v. State, 10 S. & M. (Miss.) 194.

This is on the general principle stated in a former chapter, that where a recital in the bill of exceptions contradicts the record, the former will supersede the latter in that particular, because the signature of the judge imports absolute verity.

CHAPTER XV.

OTHER EXCEPTIONABLE MATTERS.

§ 854. THE general principle in regard to the subjects of exception is, that the matter or decision excepted to must have arisen during the progress of the cause and before final judgment.¹ Any decision or declaration by the court upon the law of the case, made in the progress of the cause, and by which the jury are influenced and the counsel controlled, is considered as coming within the scope and meaning of the term instructions to which exceptions may be taken.² An appellate court, however, does not sit to settle facts, and will only so far inquire into an issue of fact tried in the court below, as to ascertain whether the evidence had a legal tendency to support the finding of the court below.³

§ 855. Rulings on motions — except such as are within the discretion of the court merely — are a proper subject of exceptions; and in no case are they

¹ *Swafford v. Dovenor*, 1 Scam. (Ill.) 165.

³ *Lyman v. Tarbell*, 30 Vt. 463; *Stevens v. Hewitt*, *ibid.*

² *Sowerwein v. Jones*, 7 Gill. 262.
& *Johns. (Md.)* 335.

a part of the record, unless brought in by bill.⁴ Thus, on an order dissolving an injunction, the bill must show on what grounds the court acted therein, or the order cannot be reviewed.⁵ And where a change of venue is granted, the grounds of objection to the charge must be set out by the exceptor.⁶ And where there is a motion to transfer a cause for want of jurisdiction, the motion must be made a part of the record by means of a bill of exceptions.⁷

So, where there was an appeal from the judgment of the Circuit Court in an action on a promissory note, and it was assigned for error that the court sustained a motion of the plaintiff to strike from the files the plea of the defendant denying the execution of the note, the Supreme Court refused to consider the matter, because the bill of exceptions did not show that any such motion was made, or any rulings concerning it.⁸ And where a bill showed that there had been a motion to quash a writ of *certiorari*, but did not show any rulings upon it or exceptions taken, it was disregarded for the same reason.⁹

A decision refusing a continuance in a criminal case is reviewable on a bill of exceptions.¹⁰ But, of course, in order to prevail, the bill must show that the affidavit set forth proper grounds for a continuance, as that a material witness is absent, and that due diligence has been employed to secure the testi-

⁴ *Cook v. Bank*, 1 Iowa (Greene) 447.

⁵ *Gould v. House*, 40 Ind. 403.

⁶ *Baker v. Simmons*, *ibid.* 442.

⁷ *Lane v. Taylor*, *ibid.* 495.

⁸ *Gaddy v. McCleane*, 59 Ill. 182.

⁹ *Thompson v. White*, 64 Ill. 315.

¹⁰ *People v. Ashnaner*, 47 Cal. 98.

mony, &c. And the affidavit must be copied into the bill as in other cases, or in some other way clearly identified as having been read on the hearing of the motion.¹¹

In California, an order setting aside a default may be excepted to;¹² but I think the general rule is otherwise, this being regarded a purely discretionary matter.

A motion to quash an execution for issuing at the wrong time, can be reviewed, and the bill should embody the execution.¹³ And in a motion to quash a forthcoming bond and execution thereon, the grounds of the motion must appear, and also the execution and bond be set out; and if the ground is at variance between the original bond and the judgment, or like defect, the judgment also must be inserted in the bill.¹⁴

The proof, whether oral or otherwise, which is taken on a motion to quash an execution, or set aside a sale under it, should be set out in a bill.¹⁵

§ 856. The only judgment which can be rendered on a petition for review is, that a writ be or be not granted; and this, therefore, is a final judgment, to which an exception will lie on proper grounds shown.¹⁶

§ 857. On exceptions to the rulings of the lower court on the taxation of costs, no question is open which is not stated in the bill of exceptions, even

¹¹ *People v. Weaver*, *ibid.* (Miss.) 580; *Merrett v. Vance*, *ibid.* 498.

¹² *Grazidal v. Bastauchure*, *ibid.* 167. ¹⁵ *Nesbitt v. Dallam*, 7 Gill. & Johns. (Md.) 494.

¹³ *Davis v. Baldwin*, 1 How. (Miss.) 550. ¹⁶ *Davenport v. Holland*, 2 Cush. 11.

¹⁴ *Huston v. Hayter*, 6 How.

though it should appear in the bill of costs referred to in the exceptions.¹⁷

§ 858. In regard to masters', auditors', and referees' reports, an exception to the finding of a master upon the facts before him, is to be regarded only so far as it is supported by the statements of the master, or the evidence reported by him,¹⁸ because a court does not investigate the items of an account, nor review the whole mass of testimony taken before the master.¹⁹

And where a cause is referred by consent, the findings of the referee upon matters of fact can only be reviewed when it is so clearly against evidence, or without evidence, as to create a reasonable apprehension of his bias, partiality, or mistake; and it is not enough that the court see such reason to doubt the correctness of the finding that they would have sustained the report of the referee if he had come to an opposite conclusion, or think that they should upon the evidence have found otherwise.²⁰

In Maine, by the Revised Statutes and amendatory act of 1845, either party may file exceptions to any decision of the District Court in accepting, rejecting, or recommitting a report of referees.²¹ But exceptions may only be made to such action of the District Court, and not directly to the report of the referee itself, whose judgment is final, unless in cases of corruption, gross partiality, or evident excess of power.²²

¹⁷ Richardson v. Curtis, 2 Gray, 497.

¹⁸ Jones v. Keen, 115 Mass. 181.

¹⁹ Harding v. Handy, 11 Wheat. (U. S.) 126.

²⁰ Brooks v. Christopher, 5 Duer, 216.

²¹ Lathrop v. Arnold, 25 Me. 136.

²² Black v. Hickey, 48 Me. 546.

In Georgia, where an exception to an auditor's report, to whom a case has been submitted, directly contradicts the report, the former should be supported by proof in the court below,²³ and the matter may be tried by a jury, and evidence adduced in addition to that heard before the auditor.²⁴ And as in other cases, the rulings of the court therein are subject to exception.

So in North Carolina, a jury may try exceptions to a referee's report, where the reference is compulsory, but not where it is by consent; for this consent waives trial by jury.²⁵ Exceptions may be taken on the ground that the referee adopted a former settlement as the foundation of his report; or that he stated no evidence upon which he found the facts reported; or that he filed no vouchers or receipts, and referred to none authorizing the disbursements reported; or that he did not state when certain judgments were obtained.²⁶

§ 859. Where there is a general verdict of guilty, it is within the discretion of a judge whether inquiry shall be made of the jury as to the grounds or counts of the indictment on which the verdict is based; and, if no such inquiry is made, the general verdict will be applied to each count. But if the inquiry is made, and elicits the fact that the jury had not passed upon the counts separately, it is error in the court to cause the verdict to be recorded, and exception may be taken thereto.²⁷

²³ *Camp v. Mayer*, 47 Ga. 415.

²⁶ *Wilson v. Abrams*, 70 N. C.

²⁴ *Roberts v. Summers*, *ibid.*

324.

434.

²⁷ *Commonw. v. Carey*, 103

²⁵ *Green v. Castlebury*, 70 Mass. 216.

N. C. 20.

In Alabama, it is held that, where a bill of exceptions in a criminal case purports to set out all the evidence, and does not show that the venue was proved, but exception was taken to the conviction and sentence, the judgment will be reversed on error on account of the defect in the evidence, even though no specific charge was given or asked in regard to the proof of venue.²⁸

In Florida, under the statute, even where a defendant in a criminal action introduces no testimony on the trial, he is entitled to the concluding argument before the jury, and the statute is held not to be directory, but mandatory, in its character; and, if the court deny the right, exceptions will be sustained.²⁹

§ 860. The answer made by a juror, when polled, is a part of the proceedings of the court, and should be shown by a bill of exceptions.³⁰

And the challenge of a juror, on the ground that he did not understand the English language, cannot be considered, except when shown by a bill of exceptions.³¹

And where exception is taken to the refusal of a judge to sustain a challenge of a juror for cause, the bill must show that no question of fact, but only of law purely, was the ground of the decision,³² and so must set forth the cause of the challenge.³³

²⁸ *Frank v. State*, 40 Ala. 9. (Walker, Ch. J., dissenting.)

²⁹ *Heffson v. State*, 8 Fla. 73.

³⁰ *Meddler v. State ex rel. Dunn*, 26 Ind. 171.

³¹ *Thomas v. Zushlay*, 25 Tex. (Supp.) 228.

³² *State v. Bunger*, 14 La. An. 461.

³³ *State v. Dove*, 10 Ire. (N. C.) 469.

§ 861. The granting of a nonsuit is a question of law, and can be brought up for review without a motion for a new trial.³⁴

The overruling of a judgment on a special finding can be presented in the Supreme Court, where the motion states the ground of the application, without a bill of exceptions, the motion, in this case, being regarded as a part of the record, contrary to the general rule. So held in Indiana.³⁵

In Georgia, it is held that an exception to a judgment need not specify the objections to the judgment, but only object, in general terms, to the entry thereof, on a demurrer;³⁶ which is the general rule, doubtless, where an exception is regarded as needful at all.

§ 862. As to the pleadings in a cause, the rulings concerning them must be distinctly set out. And directly; for questions concerning the sufficiency of a declaration cannot be considered as an appeal from a decision denying a new trial.³⁷ The pleadings and judgment are in the record, and ought not to be set out in a bill.³⁸ But in Indiana, it is held that a bill of exceptions is necessary, to present for review the striking out of a paragraph in an answer,³⁹ or of a complaint.⁴⁰ And the reason given is that the striking out takes it out of the record, and it can only be brought into the record therefore by a bill,—a reason that looks somewhat rigidly technical.

³⁴ *Cravens v. Dewey*, 13 Cal. 40.

³⁸ *Whitfield v. Westbrook*, 40 Miss. 315.

³⁵ *Campbell v. Dutch*, 36 Ind. 504.

³⁹ *Ammerman v. Crosby*, 26 Ind. 452.

³⁶ *Barksdale v. Brown*, 16 Ga. 97.

⁴⁰ *Reeves v. Plough*, 41 Ind. 204.

³⁷ *Jacks v. Buell*, 47 Cal. 162.

§ 863. Where an exception has been tried and overruled, the same questions involved in the exceptions cannot be again brought up in another form in the same court; as, for example, by motion to suspend further proceedings in the cause.⁴¹

§ 864. A court having power to punish for contempt is the exclusive judge whether misbehavior in court amounts to contempt or not, and its decision is not reviewable;⁴² unless where the question of jurisdiction is raised and adjudicated upon.⁴³

§ 865. Issues and questions of law, in *habeas corpus* proceedings, in an inferior court, may be reviewed on exceptions.⁴⁴

Also an order made at chambers dissolving an injunction.⁴⁵ And an order improperly transferring a cause to the chancery docket.⁴⁶

§ 866. In New Jersey, a bill of exceptions cannot be taken in case of an appeal to the Common Pleas from a justice's court, but the court may certify the case to the Superior Court.⁴⁷ But this is evidently exceptional, and not the general rule.⁴⁸

And in Arkansas, it is held no part of the office of a bill of exceptions, to set out the abandonment of a count in the declaration, this being in the record; and so, if the record does not show it, a recital in the bill of exceptions to that effect is of no avail.⁴⁹

⁴¹ *Miller v. Dupuy*, 19 La. An. 166.

⁴² *In re Cooper*, 32 Vt. 254.

⁴³ *R. R. v. R. R.* 49 Me. 392.

⁴⁴ *In re Cooper*, 32 Vt. 254.

⁴⁵ *Moore v. Ferrell*, 1 Kelley (Ga.) 6.

⁴⁶ *Parshall v. Moody*, 24 Iowa, 314.

⁴⁷ *Boston v. Morris*, 1 Dutch, 173.

⁴⁸ *Commonw. v. Doty*, 3 Met. (Mass.) 20.

⁴⁹ *State v. Jennings, for use.* (Ark.) 448.

§ 867. Although it appears from a bill of exceptions that goods sued for are appropriate articles for use as household furniture, yet if it does not also appear that the plaintiff had actually used them, or intended to use them thus, the Supreme Court will not presume that they were exempt from execution or attachment.⁵⁰

CHAPTER XVI.

MODE AND TIME OF TAKING EXCEPTIONS.

§ 868. IN theory, a bill of exceptions is wholly drawn up and perfected at the trial; but in practice, this would often be exceedingly inconvenient, and so the exception may be noted at the time the matter arises, and afterwards be reduced to form and signed. But in the United States Courts, it is then signed *nunc pro tunc*, and the bill must purport to have been actually reduced to form and signed during the trial; and where this is not the case, it is a fatal error.¹

§ 869. There are some variations in the practice of different courts in regard to the time of taking exceptions. They are, however, mostly modifications of the principle that exceptions must be taken and noted at the time the decision is made on which they are based. As already intimated above, an exception to a ruling must be nominally perfected at the time and actually

⁵⁰ Bourne v. Merritt, 22 Vt. 429.

¹ Walton v. U. S. 9 Wheat. 651.

noted; and a bill must set out the ruling and allege that the party "then and there excepted."²

And the principle in these courts is applied to exceptions to the rulings of a master.³

It will be more convenient, and have the advantage of brevity, rather to note the variations from the general rule than to set forth all the confirmatory decisions upon the matter.

As to evidence, it must be objected to when offered, and not after it is admitted. And so in general with any ruling. "At the time" means on the very instant. As to instructions, the exception need not be taken before the reading thereof to the jury.⁴ But while usually exceptions must be taken to a charge before the jury retires, yet, in Vermont, it has been held that such a rule is one of practice merely in the lower court, and is not to be regarded in the Supreme Court, which, therefore, is bound to revise all questions made in regard to such charge, whether it was at the time excepted to or not, unless, perhaps, in regard to some unintentional omission of the court to charge upon a point in the case, which would have been done if the matter had been brought to the attention of the court at the proper time.⁵ And yet the case in which this was held has been impliedly overruled by a later decision, which, however, does not notice the former.⁶ And, in Massachusetts, it has been held that, where an instruction obviously ex-

² *Lessee v. Bank of Indiana*, 590 (overruling *Long v. Hughes*, 1 Wall. 592.)

³ *Troy Iron, &c., Factory v. Corning, & Blatchf.* 328.

⁴ *Paston v. Exec'r*, 8 Bush.

⁵ *Buck v. Squiers*, 23 Vt. 498.

⁶ *State v. Clark*, 37 Vt. 472.

tends to the whole ground of defence, and is not of a casual or incidental nature, a defendant is not in default for not calling attention to its inaccuracy before the jury retired.⁷ But this, also, has been changed by statute of 1863.

In California, as the practice act does not fix the time of taking exceptions to the charge of the court, it is held that, if an exception is taken after the jury retires, and before verdict is rendered, it is within the discretion of the court to allow it; and the Supreme Court will not interfere with the exercise of that discretion in any way.⁸

In Georgia, exceptions may be taken and presented at any time within thirty days, and no notice of such intention needs be given.⁹ But exceptions cannot be taken at a subsequent term to interlocutory orders.¹⁰

§ 870. In Pennsylvania, an exception is waived if not reduced to writing during the trial, though an exception to a charge may be taken at any time before the verdict is rendered.¹¹ And so in Iowa.¹²

§ 871. In Illinois, the arrest of a counsel pending a criminal trial is held not to avail the defendant in excuse for not taking and perfecting exceptions.¹³

§ 872. Where the court tries a cause without the

⁷ *Esty v. Wilmot*, 15 Gray, 170.

⁸ *St. John v. Kidd*, 26 Cal. 263.

⁹ *Carey v. McDougald*, 4 Ga. 610.

¹⁰ *Pettis v. Campbell*, 47 Ga. 597.

¹¹ *Wheeler v. Winn*, 53 Pa. St. 122.

¹² *Glaggett v. Gray*, 1 Clarke, 19.

¹³ *O'Hare v. People*, 40 Ill. 534.

intervention of a jury, exceptions must be taken at the time,¹⁴ before the final judgment.¹⁵

§ 873. In Maine, it is held too late to except to the submission of improper matters to commissioners of partition, at the rendering of their report at a subsequent term.¹⁶

But, of course, exceptions to the report itself can only be made after the coming in thereof, and when it is presented for allowance and confirmation.¹⁷

§ 874. In Maine, a case arose in regard to the taxation of costs, and the court held that where a final judgment has been ended, the parties are out of court, and the judicial power of the court ceases, nothing remaining but to tax the costs, which requires only the exercise of ministerial powers, since costs are only incidental to the judgment. Yet if the costs are taxed at the term, and an adjudication thereon is had, either party may except to the rulings thereon, although it is otherwise where, on appeal from a clerk's taxation, the question is adjudicated by one of the judges in vacation, or at a subsequent term. And it is not within the discretion of a judge at *Nisi prius* to order the action brought forward and entered on the docket of a subsequent term, not for the purpose of amending the record, but in effect to nullify it, so that a negligent party may have an opportunity to except to the decision in regard to the taxation of costs.¹⁸

And, in general, questions arising in a continued

¹⁴ Parsons v. Evans, 17 Ill. 238.

¹⁵ Kilgore v. Bowie, 9 Mo. 291.

¹⁶ Allen v. Hall, 50 Me. 253.

¹⁷ Smith v. Hurd, 8 S. & M. (Miss.) 682.

¹⁸ Shepherd v. Rand, 48 Me. 244.

case, at the term during which exceptions are taken, can alone be presented. Exceptions cannot reach the proceedings of a former term.¹⁹

§ 875. An exception must be taken by one of the parties to the cause; and an *amicus curiæ* cannot take a valid exception.²⁰

§ 876. There needs not be a separate bill to each exception. One bill at the conclusion can properly contain all the exceptions taken during the trial.²¹

§ 877. It must appear when the exceptions were taken. And so, where a record contained a bill of exceptions signed and sealed in term time, and also other exceptions without date, and without anything on their face to show when they were taken, which were entirely disconnected from the bill, but purported to be taken "during the further progress of the cause," these were rejected as forming no part of the record.²² There needs not, however, be an explicit averment that the exceptions were taken at the time. If the fact appears from the whole record, it is sufficient.²³ And so, in Indiana, when the court decides against a party on demurrer, he may except to the ruling; and when the bill states that, "after hearing the argument, the court sustains the demurrer, to which opinion of the court the plaintiff excepts," it is held a sufficient showing that the exception was taken at the time. However, an exception is not necessary in such case, but merely discretionary with the party.²⁴

¹⁹ Lathrop v. Page, 26 Me. 120.

²⁰ Darlington v. Warner, 14 Ind. 449.

²¹ Lane v. Kingsberry, 9 Mo. 402.

²² Munap v. Bank, 20 Ala. 392.

²³ Telegraph Co. v. Hobson, 15 Gratt. (Va.) 122.

²⁴ Dace v. Oppenheim, 12 Ind. 537.

But in Illinois, where a bill was filed two days after judgment, and stated in the conclusion "to all which opinions of the court the plaintiff excepts," it was held not sufficiently to show when the exception was taken, but be construed to refer to the present time when the bill was drawn.²⁵

§ 878. It is a sufficient note of an exception taken on the trial that the ruling was "objected to" at the time when made.²⁶

§ 879. A motion for a new trial waives prior exceptions.²⁷

CHAPTER XVII.

PREPARING BILLS OF EXCEPTION.

§ 880. WHEN exceptions are noted during the progress of the trial, they are to be brought into form afterwards, settled between the parties, presented to and allowed by the judge, and signed and sealed by him, as a general rule. We will notice what may be needful to state in regard to these several particulars.

And the first inquiry is as to what constitutes a formal bill.

The entries on a judge's minutes are only regarded as memoranda of exceptions, and so not in themselves bills of exception, but only evidences of the right of

²⁵ *Gibbons v. Johnson*, 3 Scam. 61.

²⁷ *Ellis v. Warren*, 35 Me. 125.

²⁶ *Sackett v. McCord*, 23 Ala. 851.

the party to demand a bill at the proper time,—memoranda, in fact, for preserving the rights of the party in case the verdict should be against him, and he should wish to have the case reviewed in an appellate court. The bill is to be reduced to writing, and signed and sealed by the judge, usually.¹

And, in general, a bill should consist of a single paper or papers, connected together so as to form a connected whole. And so a bill which, instead of containing any testimony, objections, or rulings of the court, merely states that these matters appear by papers on file which are to be annexed thereto, and form a part of the bill, is not in proper form; and a judge is not bound to sign a bill in such a condition that documents are to be afterwards attached to it before it can become a complete and intelligible document;² although sometimes blanks may be filled with specified documents,—and yet even this is not held advisable. To make a paper a part of a bill, it must be incorporated in it, attached to it, or filed with it, and so described as to leave no doubt of its identity; and when not so made a part of the bill, the defect is not cured by a journal entry directing it to be taken as a part thereof.³ However, a more lax practice seems to prevail in Iowa, where a cause is tried by the court without a jury. It is held in such case, that, if the finding of the court is reduced to writing, and all the testimony, with the exceptions of the party complaining, is set out in the record, and all together

¹ *Pomeroy's Lessee v. Bank*,
1 Wall. 592.

³ *Busby v. Finn*, 1 Ohio St.
409.

² *State ex rel. v. Naggle*, 16
Wis. 333.

signed by the judge who tried the cause, the paper is to be treated as a bill of exceptions.⁴

An agreed statement of facts cannot be made a substitute, but it becomes a part of the record only by means of a bill.⁵ And when matter is thus sought to be brought in, or by affidavits filed in the cause, or by the certificate of a clerk, it must be disregarded by the Supreme Court.⁶ And so, where exceptions were filed to an award, which were overruled on argument, and the court filed an opinion setting out the facts, it was held that the opinion and facts in it were not part of the record, and could not be considered.⁷

But in New York, under the code of 1849, no bill is necessary on a case made, nor need there be any signing or sealing.⁸

§ 881. As to the time of preparing bills, the rule is, that, unless there is an extension of time by leave of the court and consent of the parties, the settling, signing, and sealing must be completed during the term at which the trial took place, and, in California, be attached to the judgment roll.⁹

In Kentucky, an extension, in the proper sense, cannot be allowed at all; and if time is allowed for completing a bill in vacation, it is held to be extrajudicial, and therefore unauthorized and void.¹⁰ And if time can be allowed until a subsequent term, it can

⁴ *Snell v. Kimmell*, 8 Clarke, 282.

⁵ *Kennedy v. Merry*, 11 Mo. 214.

⁶ *Young v. State*, 23 Ohio St. 578.

⁷ *Bartolett v. Dixon*, 73 Pa. 129.

⁸ *Zabriskie v. Smith*, 1 Kernan, 481.

⁹ *More v. Delvalle*, 38 Cal. 171.

¹⁰ *Corley's Ex'r v. Evans*, 4 Bush. 410.

only be done by withholding the judgment or suspending the effect thereof after it is rendered, and thus retaining control over it until the subsequent term, and then making it a judgment of the subsequent term.¹¹ And so, in Tennessee, it is imperative that a bill must be perfected at the trial term, and the judge has no power to extend the time to a subsequent term; and although a motion for a new trial may be made and continued to a subsequent term, it does not carry with it the right to file a bill of exceptions at another than the trial term.¹²

In Indiana, where a defendant in a criminal case was allowed by the court thirty days within which to file his bill, which period extended beyond the term, and the bill accordingly was not filed until after the expiration of the term, it was held that, in the absence of anything to the contrary, it was to be taken as not having been presented to the judge within the time allowed by law, viz., within such time as the court might allow during the term.¹³ And in any case, it is held that where time is extended beyond the term of the court, there must appear a special reason for thus exercising the authority of the court.¹⁴ And in a criminal case, time cannot be extended beyond the term.¹⁵ And in other cases, where time is given beyond the term to file a bill, it must be signed within the time limited, unless the signing is pre-

¹¹ *Commonw. v. McCready*,
2 Met. 376.

¹² *McGavock v. Puryear*, 6
Coldw. (Tenn.) 34.

¹³ *Fitzainder v. State*, 30 Ind.
239.

¹⁴ *McElfatrick v. Caffrath*, 29
Ind. 38.

¹⁵ *Dunn v. State*, *ibid.* 259.

vented by the death or absence of the judge. And where the extended time has expired, the power of the judge over the record is at an end.¹⁶

It was formerly held that if a bill be signed and sealed within the time, but not filed until afterwards, it was a part of the record, and could not be stricken out on motion.¹⁷ But this has been overruled by a subsequent case.¹⁸ The filing, however, may be made to appear inferentially, as by the certificate of the clerk, made within the time allowed for filing the bill, stating that the record is a full, true, and complete transcript of all the proceedings of record, and of papers on file in his office.¹⁹ But otherwise the transcript must show affirmatively that the bill was filed within the time limited.²⁰

Where a bill states on its face that it is filed in time, it is construed to mean only that the judge signed it in time, since no one but the clerk can say when it was filed.²¹

Leave for extending time must be obtained within the time first limited; otherwise the record is to be considered beyond the reach of the court, unless the opposite party be brought in by notice, and even this method is held to be doubtful after time expired.²²

Where time is given "till next term," this does not include any part of the next term; and where, under

¹⁶ *Vanness v. Bradley*, *ibid.* 388.

¹⁷ *Albaugh v. James*, *ibid.* 398.

¹⁸ *Stone v. McKinney*, 43 Ind. 352.

¹⁹ *Oliver v. Pate*, 43 Ind. 132.

²⁰ *Wiggs v. Koontz*, 43 Ind. 430.

²¹ *Bargis v. Farrar*, 45 Ind. 41.

²² *Noble v. Thompson*, 24 Ind. 347; *Sherman v. Crothers*, 25 Ind. 417.

this leave, one filed a bill of exceptions on the sixth day of the term, it was held too late.²³

In Wisconsin, a judge at chambers or a court commission has power, even after the statutory period has expired, to grant further time, provided the delay is satisfactorily excused. And where an order was made extending the time thus for thirty days, upon the condition that the appellant should pay the cost of the motion within five days, it was held the commissioner had power, upon the lapse of the five days, to extend the time for such payment, and might properly do so on being satisfied that the failure to pay resulted in a mistake of the attorney as to the date of the order.²⁴ Under the session laws of 1858, time was allowed to the next regular term of court,²⁵ criminal cases being excepted, which still were to be completed before the end of the trial term,²⁶ unless the district attorney consents to an extension.²⁷

In Illinois, a bill must be reduced to form, and signed during the trial term, except by agreement of counsel, or the direction of the judge that it may be entered in vacation, and signed *nunc pro tunc*. But in all cases it should appear on the face to have been taken and signed at the trial.²⁸ And in one case it was held that a bill signed and filed on the 17th of September, when the trial had occurred on the 14th, was good, as it appeared to have been taken at the

²³ De Haven v. De Haven, 46 Ind. 296.

²⁴ Pellage v. Pellage, 32 Wis. 136.

²⁵ State ex rel. v. Gale, 7 Wis. 693.

²⁶ Oleson v. State, 19 Wis. 560.

²⁷ Rathbouer v. State, 23 Wis. 469.

²⁸ Evans v. Fisher, 5 Gil. 453.

term, and the exceptions appeared to have been taken properly, even though no reason appeared why it was not signed on the 14th.²⁹ Also where the bill was sealed and filed some days after the trial, and the exceptions noted in the present tense, but it explicitly appeared from the body of the bill that the exceptions were actually taken at the trial, the bill was held available.³⁰ But otherwise, where a bill was not signed for two years, and that from the memory of the judge, without minutes, and without any exceptions taken at the time.³¹

Where a party presents his bill to the judge in time, he has performed his part, and is not to be prejudiced by the judge's delay in not signing until the time had expired. And when a judge has signed, if nothing appears to the contrary, it will be presumed that he would not have done so if not presented in proper time; and the mere fact that the bill was not filed within the prescribed time will not rebut that presumption, although it may be rebutted by proof.³²

In Michigan, an order of extension may be had after the time usually prescribed has expired,³³ but during the term.³⁴ The power extends to criminal cases, also, in like manner.³⁵ But it seems that a consent of parties dispenses with the necessity of an order of extension during the trial term.³⁶

²⁹ *Necce v. Halcy*, 23 Ill. 416.

³⁰ *R. R. v. Palmer*, 24 Ill. 45.

³¹ *Dent v. Davison*, 52 Ill. 110.

³² *Underwood v. Hossack*, 40 Ill. 99.

³³ *People v. Littlejohn*, 11 Mich. 61.

³⁴ *Cleveland v. Stein*, 14 Mich. 335.

³⁵ *Crofoot v. People*, 19 Mich. 254.

³⁶ *Atlas Mining Co. v. Johnston*, 22 Mich. 78.

And the same rules seem to be applicable to a case made as to a bill.³⁷

In Missouri, where at the foot of a bill was entered what purported to be an agreement by the plaintiff's attorney that the defendant might file it *nunc pro tunc*, but there was no entry on the record concerning it, the bill was stricken out,³⁸ and consent of the opposite party is necessary for an extension beyond the trial term.³⁹ And the consent must be made a matter of record.⁴⁰

In Alabama, a bill may be signed by consent of the parties in vacation.⁴¹ But not otherwise; and where a term expired by law at twelve o'clock on Saturday night, and a bill was signed by the judge on the following morning "before the verdict, and judgment, and sentence of the court had been entered on the minutes, and before the minutes were signed," it was held not signed during the term.⁴²

In California, thirty days are allowed from the entering of the judgment,⁴³ and a bill of exceptions is required in a criminal case after a motion for a new trial is overruled.⁴⁴

It appears that, in the United States Circuit Courts, a bill may be sealed two years after the trial if there

³⁷ Turner v. Grand Rapids, 20 Mich. 390.

³⁸ Ruble v. Thomasson, 20 Mo. 263.

³⁹ Diepenbrock v. Shaw, 21 Mo. 122; Farrar v. Finney, 21 Mo. 569.

⁴⁰ West v. Fowler, 55 Mo. 300.

⁴¹ Stephens v. State, 47 Ala. 696.

⁴² Bryant v. State, 36 Ala. 270.

⁴³ Caldwell v. Parks, 47 Cal. 640; Berry v. R. R. *ibid.* 643.

⁴⁴ People v. Ah Fat, *ibid.* 631.

appears to have been error in the instructions given to the jury.⁴⁵

In Massachusetts, in an equitable action, it was held too late, after the adjournment of the court, to apply to the judge for the allowance of exceptions, and that a written agreement entered into before the trial, in which the parties waived certain claims and objections, and stipulated that the rulings of the court should be subject to exceptions as in actions at law, did not extend the time within which the exceptions should be presented for allowance.⁴⁶

In Vermont, the time allowed for filing exceptions is thirty days from the final adjournment of the court.⁴⁷

And in Massachusetts, if the judge does not allow exceptions within fifteen days after they are presented to him, the Supreme Court will not entertain them.⁴⁸

In California, however, the delay of the judge will not prejudice the case of a prisoner, the statute being held directory which directs the signing within ten days. But the prisoner must prepare his bill, and present it within the ten days, or such further time as may be granted by the district judge or a judge of the Supreme Court, or else give sufficient excuse for his failure to do so. If the judge signs after the statutory period, the Supreme Court will presume he had sufficient reason for so doing.⁴⁹

In Virginia, it must appear by the record that the

⁴⁵ *Greenway v. Graither*, Ta-
ney, 227.

⁴⁶ *Phillips v. Soule*, 6 Allen,
150.

⁴⁷ *Howard v. Town of Bur-*
lington, 35 Vt. 491.

⁴⁸ *Elwell v. Dizer*, 1 Allen,
484.

⁴⁹ *People v. Lee*, 14 Cal. 510

bill was signed during the term, or the court will not entertain it.⁵⁰

In Iowa, a consent or agreement for signing in vacation must be in writing. But if the bill is silent as to when it was settled, it will be presumed to have been settled in term time regularly,⁵¹ or so settled by agreement, without reference to the time of filing.⁵²

In New York, the presumption is, from the judge signing the bill, that it was presented in proper time.⁵³

In Georgia, it is held that, if the bill bears date before the trial, and there is nothing in the record by which it can be amended and the true date be known, a writ of error must be dismissed.⁵⁴

In Pennsylvania, it is held that the rules for the presentation and settlement of bills of exception within a specified time are for the benefit of defendants in error, and cannot be disregarded without their consent.⁵⁵

§ 882. In some states it is requisite to serve a notice of the settling of a bill upon the opposite party, and sometimes even a formal copy of the bill itself. Thus, in Minnesota, where such notice was not given, it was held the bill must be dismissed.⁵⁶ And in Wisconsin, the service of a bill is requisite on the part of the appellant, and of amendments thereto on the part of the respondent. And where, after such reciprocal service, a time is stipulated for settling the bill, the

⁵⁰ *Telegraph Co. v. Hobson*,
15 Gratt. 122.

⁵¹ *Claggett v. Gray*, 1 Clarke,
19.

⁵² *Mays v. Deaver*, *ibid.* 216.

⁵³ *Harlow v. Humiston*, 6
Cowan, 191.

⁵⁴ *Perry v. Higgs*, 6 Ga. 43.

⁵⁵ *Kirkpatrick v. Tex*, 49 Pa.
St. 123.

⁵⁶ *Daniels v. Winslow*, 2 Min.

113.

time cannot be afterwards settled on notice, unless the time has been extended by a judge or a court commissioner.⁵⁷ And where a bill appears to have been filed before notice of settlement, it must be stricken from the files; and that notice or service of the bill must be within sixty days after written notice of the judgment; and two years are allowed for appeal.⁵⁸

But where a bill was settled before a judge, and one of the plaintiff's attorneys appeared and professed himself satisfied with it, the judge having at his instance rejected a draft presented by the defendant's attorney, and accepted his substitute with some exceptions, and the judge filled in the date and signed the bill in the presence of another of the plaintiff's attorneys, who made no objection to the bill, which recited that it had been settled by the court in the presence of the attorneys for the parties, and afterwards the plaintiff's attorneys moved to strike it from the files, on affidavit that they had received no notice, and had never assented to the signing of it, the motion was denied, as their conduct amounted to a waiver of notice, and of objection to the draft of the bill.⁵⁹

It must clearly appear that notice of the judgment was served, or a bill prepared afterwards will not be stricken off the files as out of time.⁶⁰

In Georgia, service of bill is held not needful;⁶¹ and

⁵⁷ *Yule v. Ely*, 21 Wis. 326.

⁶⁰ *Oliver v. Town*, 28 Wis.

⁵⁸ *Vroman v. Dewey*, 22 Wis. 328.

360.

⁶¹ *Bliss v. Stevens*, 13 Ga.

⁵⁹ *Estabrook v. Messersmith*, 402.

18 Wis. 545.

the power of revising the testimony is vested in the judge;⁶² which power, however, entirely ceases with signing and filing, so that he cannot make any changes afterwards.⁶³ As also in Alabama.⁶⁴ Of course, both parties have a right to insist on all the facts and exceptions being inserted in the bill.⁶⁵

In West Virginia, the judge may afterwards make corrections in the bill.⁶⁶

In an English case the question arose, but was not determined, whether a judge has power to amend after signing. If the matter had not passed off in another way, the indication was that the power would have been conceded, especially as it was held distinctly that the court in banc had no jurisdiction to inquire into such amendment, if made.⁶⁷

In North Carolina, a paper was appended to the transcript, purporting to be exceptions, signed only by the counsel for the defendant, and therein alleged to have been taken by them on the trial. It was decided that the court could not take notice of it because it had not the sanction of the judge;⁶⁸ for, although it is held necessary, in some states, that exceptions to instructions should be signed by the party or his attorney, and that they so appear of record,⁶⁹ yet a final signing of the bill by the judge is held generally an

⁶² *Burtine v. State*, 18 Ga. 537.

⁶³ *State ex rel. v. Powers*, 14 Ga. 389.

⁶⁴ *Kitchen v. Moye*, 17 Ala. 394.

⁶⁵ *Shaw v. Mason*, 10 Kan. 190.

⁶⁶ *Seibright v. State*, 2 W. Va. 593.

⁶⁷ *Docks, &c., v. Penhallow*, 7 Hurl. & Nor. 329.

⁶⁸ *State v. Hart*, 6 Jones, 390.

⁶⁹ *Bush v. Denham*, 15 Ind. 252; *Maghee v. Baker*, *ibid.* 254.

essential requisite with some exceptions, where it may be certified by the clerk, or otherwise authenticated.⁷⁰

If a party dies after filing exceptions and before allowance by the judge, yet the exceptions may be considered by the appellate court; for although, technically, there can be no appearance for a deceased person, yet the court will pass upon the merits from any one who holds the office of an attorney within the court. So held in Massachusetts.⁷¹ In Michigan, it is held that the administrator in such case should be brought in to the settlement of the bill, by notice.⁷²

Notice is not necessary in any case in Kansas; but the judge may, in the exercise of a sound discretion, sign a bill for one party alone.⁷³

§ 883. The signing and sealing by the judge is the next step after settling the contents of the bill, which must be in term time, unless otherwise provided by statute, or by a judge's order extending the time, which in some states, as we have seen, can only be obtained on consent of the parties. The allegation, however, need not be made if otherwise it appear to be in time; as where the bill is signed on the same day of the trial, as is shown by the face of the bill, it sufficiently appears to have been signed during the term.⁷⁴

The signing must, in general, be by the judge who tried the cause.⁷⁵ And without consent of parties, it

⁷⁰ *Riker v. Scofield*, 6 Wis. 367.

⁷¹ *Kelley v. Riley*, 106 Mass. 342.

⁷² *Van Valkenburg v. Rogers*, 14 Mich. 225.

⁷³ *McClure v. R. R.* 9 Kan. 380.

⁷⁴ *Myers v. Segars*, 41 Ala. 383.

⁷⁵ *Brown v. Happ*, 39 Ga. 61

is held, a successor cannot sign;⁷⁶ and, *a fortiori*, a successor cannot be compelled to sign.⁷⁷

A bill may be signed, however, by a specially appointed judge, who tries the cause, in Indiana,⁷⁸ although he does not hold the office of judge. But the special appointment must appear of record.

Where a court consists of several judges, a majority must sign the bill, if present; although it has been held that, where a presiding judge is authorized to hold a court alone, and a bill has been signed by him, it will be presumed that the associates were not present until the contrary appears by the showing of the defendant in error, and that, too, though it may appear that all the judges were present at the commencement of the term.⁷⁹ But in Ohio, under a statute merely requiring the judges to whose opinion exception is taken to sign the bill, it was held that, where two judges were of opinion that a new trial should be granted in a cause, and the other two overruled the motion therefor, it was the duty of the judges overruling the motion, and to whose decision the exception therefore was taken, to sign the bill.⁸⁰

In Michigan, a judge may sign a bill after resigning his office, although there might have been irregularity in the settlement, since otherwise the party might be remediless without his own fault;⁸¹ and especially so

⁷⁶ *Consaul v. Sidell*, 7 Mo. 250.

⁷⁷ *Fellows v. Tait*, 14 Wis. 156.

⁷⁸ *Negley v. Wilson*, 15 Ind. 216.

⁷⁹ *Miller v. Bruger*, 2 Carter (Ind.) 337.

⁸⁰ *Basam v. Parrish*, 18 Ohio, 266.

⁸¹ *Tefft v. Windsor*, 17 Mich. 426.

by consent of parties.⁸¹ And so in Wisconsin, after the term of office has expired.⁸²

But where a court has been abolished by an act of the legislature, it is held, in Missouri, that a former judge therein cannot sign a bill.⁸³

In Wisconsin, a judge may sign a bill after his term of office, and in a case tried by him outside of the judicial circuit for which he was elected.⁸⁴

In Indiana, a signing is not allowed after the term of office expires. But the successor may sign;⁸⁵ which is, I judge, an exception to the general rule, which is based upon the fact that one who did not hear the trial is not supposed competent to settle the bill.

In Iowa, it has been held that "Seever, Judge," is a sufficient signature,⁸⁶ and probably it would be so accounted anywhere.

If the judge dies before a bill is settled, it is held, in New York, that, to prevent a failure of justice, the appellate court will order the clerk to sign a bill in the name of the deceased judge.⁸⁷ The case in which this occurred was afterwards heard in the Court of Appeals on the bill so prepared.

It is not necessary that the bill be sealed in the United States Supreme Court.⁸⁸ Nor of late in Alabama.⁸⁹ Nor in Florida.⁹⁰ And I suppose the time is

⁸¹ *Tefft v. Windsor*, 17 Mich. 426.

⁸² *Hale v. Haselton*, 21 Wis. 320.

⁸³ *Falkerson v. Houts*, 55 Mo. 302.

⁸⁴ *Oliver v. Town*, 24 Wis. 512.

⁸⁵ *Smith v. Baugh*, 32 Ind. 163.

⁸⁶ *Mays v. Deaver*, 1 Clarke, 219.

⁸⁷ *Milvehal v. Milward*, 2 Duer, 607.

⁸⁸ *Generes v. Campbell*, 11 Wall. 193.

⁸⁹ *Moore v. Appleton*, 34 Ala. 147.

⁹⁰ *Robinson v. L'Engle*, 13 Fla. 482.

not far distant when the intrinsic absurdity of a scrawl or scroll seal will everywhere be recognized in regard to all documents and instruments. A requirement that a bill should be sealed by the judge with the seal of the court might have some meaning.

In Maryland,—but, I believe, nowhere else,—each separate exception in the bill must be separately signed and sealed; and, where this is not done, the fact that the last is signed and sealed does not make the whole one continuous exception.⁹¹

§ 884. In Missouri, where a motion for a new trial is continued, the bill may be prepared at the term at which the motion is determined.⁹²

§ 885. In Indiana, it is held that an exception, noted to the giving of an instruction at the end thereof, and signed by the exceptor or his attorney, is sufficient to make the instruction and exception a part of the record.⁹³

§ 886. In chancery, the report of a master under a reference to him is held, in Illinois, to be a part of the record without a bill, and a bill of exceptions has no appropriate office in a suit in chancery, unless it is to preserve oral evidence introduced on the hearing. All other proceedings in chancery are parts of the record, without being preserved by bill.⁹⁴ But this seems overruled by implication in the unreported case of *Brockenbrough v. Dresser*.

§ 887. In Kentucky, a bill needs not be signed and sealed, where it is spread at large upon the order

⁹¹ *Ellicott v. Martin*, 6 Md. 509.

⁹² *Riddlesbarger v. McDaniel*, 38 Mo. 138.

⁹³ *Ins. Co. v. Johnson*, 46 Ind. 315.

⁹⁴ *Ferris v. McClure*, 40 Ill. 99.

book, it then being regarded as a part of the record;⁹⁵ but this is undoubtedly exceptional.

§ 888. In making up a bill of exceptions, the court may recall a witness, and interrogate him as to what his testimony was on the trial, but neither party has a right to examine him when so called.⁹⁶

§ 889. In Vermont, a presiding judge has no authority to amend a bill after his term of office has expired, although he may do so before, even where the bill has been filed.⁹⁷

§ 890. In Alabama, the conclusion of a bill setting out the evidence and the charge does not sufficiently show that an exception was reserved to the charge when it merely states, "This is signed and sealed as plaintiff's bill of exceptions."⁹⁸

CHAPTER XVIII.

DISALLOWED EXCEPTIONS.

§ 891. In certain cases, bills of exception, as insisted on by the parties, may properly be disallowed; for a judge cannot be required to sign anything which he does not believe to be conformable to the truth. Thus, where evidence offered to prove a fact is excluded by the judge, and is afterwards admitted for

⁹⁵ Allsup v. Hassett, 12 B. Mon. 129.

⁹⁶ Whitmore v. Coats, 14 Mo. 9.

⁹⁷ Phelps v. Conant, 30 Vt. 282.

⁹⁸ Foster v. Hightower, 40 Ala. 295.

the purpose of contradicting a witness who had been examined on the subject, and a bill of exceptions states that the evidence was offered and admitted for the purpose of proving the fact, it may be disallowed properly, because not according to the truth of the case. And so, where a judge ruled that the circumstances did not authorize an implication, either that certain property was personal property or real estate, and the bill tendered stated that the judge refused to rule that, under the specified circumstances, there was no implication that a fixture was personal property, and the implication, if any, was that it was real estate.¹

§ 892. And where a bill is disallowed, the right of the excepting party to prove some of the exceptions and waive others, is limited to the case where the exceptions are wholly distinct; for, if the true and false statements are intermingled, the whole bill may properly be disallowed, and always where an exception does not state the ruling excepted to, and the evidence to which it is applied, with substantial accuracy, so as to present the same question, and in the same aspect, to the appellate court as to the court below, the petitioner cannot be heard in the Supreme Court, either in the form in which it was, or in that in which it appears it should have been presented to the judge below.² And the certificate of the judge disallowing a bill is *prima facie* evidence that it is not conformable to the truth.³

§ 893. But where exceptions are disallowed, the

¹ *Sawyer v. Iron Works*, 116
Mass. 424.

² *Ibid.*

³ *Ibid.*

exceptor may petition for leave to prove the truth thereof within the time the exceptions would, if allowed, have been entered,⁴ and on notice to the opposite party, which notice must strictly conform to rule, so that if, even by the mistake of the officer, eight days' notice is given, instead of ten, the mistake is fatal.⁵ This petition must only relate to the exceptions presented and disallowed,⁶ and also to the proper contents of the bill presented, so that, if written documents are referred to in the bill as constituting a part thereof, but which are neither copied into it nor properly identified, they cannot be brought in by the proof to establish the exceptions.⁷

The petition, in Massachusetts, must be sworn to, but the affidavit for this purpose is not to be taken as establishing the truth of the exceptions. Thereupon a commissioner is to be appointed by the court to take depositions of witnesses to be adduced by the parties.⁸

And if the petitioner neglects, without excuse, for sixteen months, to prove his exceptions before the commissioner, it is a good ground for dismissing the petition.⁹

When the commissioner reports, the question whether the truth of the exceptions is established is a question of law, to be decided by the court.¹⁰

⁴ *Elwell v. Dizer*, 1 Allen, 484.

⁵ *Phillips v. Hoyle*, 4 Gray, 568.

⁶ *Sawyer v. Iron Works*, 116 Mass. 424.

⁷ *Garlington v. Jones*, 37 Ala. 240.

⁸ *Commonw. v. Marshall*, 15 Gray, 202.

⁹ *Freeman v. Griggs*, 116 Mass. 302.

¹⁰ *Sawyer v. Iron Works*, 116 Mass. 424.

In Missouri, the method of establishing the truth of disallowed exceptions is by affidavits, without the formalities necessary in Massachusetts.¹¹

§ 894. But before the establishing thus, the bill may be authenticated by the signature of bystanders; two or more, in Iowa;¹² three in Missouri;¹³ two in Mississippi;¹⁴ three in Arkansas,¹⁵ &c., this matter being prescribed by statute. They must be attorneys, except, perhaps, in Arkansas, where they are to be simply reputable inhabitants of the state.

Where a bill is so authenticated, it must first show that it had been refused by the judge, and (in Texas) certified the cause of such refusal, that the persons signing were bystanders, that they were present at the trial, and when the fact occurred in court, concerning which the dispute exists between the judge and the party. It must point directly to the matter at issue, and the certificate must be given at the time when the fact occurred in court. It should then appear whether the judge permitted it to be filed after signing by the bystanders. If not, then the exceptions are to be proved in the appellate court.¹⁶ It must be definite, and state the points affirmatively, and not what the signing bystanders understood to be the judge's ruling.¹⁷

But it is deemed sufficient, in Mississippi, if the bill

¹¹ Bowen *v.* Lazalere, 44 Mo. 389.

¹⁵ Hixon *v.* Weaver, 3 Eng. 136.

¹² St. John *v.* Wallace, 25 Iowa, 22.

¹⁶ Houston *v.* Jones, 4 Tex. 172.

¹³ Smith *v.* R. R. 55 Mo. 602.

¹⁷ Clark *v.* Parvin, 1 Morris (Iowa) 371.

¹⁴ Van Buren *v.* State, 24 Miss. 512.

states the refusal of the judge to sign, the fact that those signing are practising attorneys, and the fact that they were present at the trial.¹⁸ And in Iowa, the judge needs not certify his refusal. The certificate of the attorneys is sufficient on this point.¹⁹ And this is probably the general rule where bystanders may sign at all, which is merely a statutory arrangement, not existing where there is no statutory enactment establishing the practice.²⁰ This method, too, can only be resorted to during the term; and if, by agreement of parties, the time of settling a bill has been extended beyond the term, it is wholly unavailable.²¹ Nor can one of the signing bystanders be an attorney of the party.²¹

§ 895. The usual remedy where a judge refuses or neglects to sign a proper bill is by mandamus, which will not issue, however, except where the bill is complete. So, where a skeleton of a bill was annexed to a petition for a mandamus containing blanks with entries, "Here insert testimony," and "Here insert motion," the petition for a mandamus was thereon overruled.²²

Mandamus lies to compel the insertion of all the evidence on the point excepted to.²³ Also, where it was not signed within the time; but in this the party must be without fault.²⁴

¹⁸ *Rawls v. State*, 8 S. & M. 599.

¹⁹ *Craig v. Andrews*, 7 Clarke, 17.

²⁰ *Murphy v. Lucas*, 2 Ham. (Ohio) 255.

²¹ *St. John v. Wallace*, 25 Iowa, 21.

²² *Walker v. Stoddard*, 31 Mo. 123.

²³ *People ex rel. Crane v. Judge*, 24 Mich. 513.

²⁴ *Lane v. Robinson*, 40 Ga. 470.

But in Pennsylvania, the remedy is not by mandamus where a judge refuses to seal a bill, but a special writ, whereon, if the judge in his return denies the facts, the petitioner has an action for a false return. And the practice is not according to the course of pleading in mandamus. A demurrer will not be allowed, but the return may be excepted to.²⁵

To a writ of mandamus, it is a sufficient return that the bill disallowed is not true.²⁶

Mandamus also lies against a clerk to compel him to certify duly to the bill.²⁷

§ 896. In England, the Court of Error does not become possessed of a bill of exceptions until the judge acknowledges his seal.²⁸ And, formerly, on motion, the judge in New York might be cited to come in and confess his seal.²⁹

§ 897. If a party fails to establish the truth of disallowed exceptions, this does not debar him from using those afterwards which were allowed.³⁰ And a party may at pleasure waive some, and use others which have been proved, where all had been disallowed.³¹ But arguing exceptions allowed may be a waiver of a petition to establish the truth of different exceptions.³²

²⁵ *Conrow v. Schloss*, 55 Pa. St. 28.

²⁶ *State v. Todd*, 4 Ham. 351.

²⁷ *Jones v. Payne*, 41 Ga. 32.

²⁸ *Earl of Glasgow v. Alum Co.* 8 Eng. L. & E. 23.

²⁹ *Pomroy v. Preston*, 2 Caines,

373; *Croswell v. Byrnes*, 9 Johns. 288 (note).

³⁰ *Phillips v. Hoyle*, 4 Gray, 568.

³¹ *Commonw. v. Marshall*, 15 Gray, 202.

³² *Moore v. Quirk*, 105 Mass. 49.

CHAPTER XIX.

PRACTICE IN THE APPELLATE COURT.

§ 898. It is the business of the clerk below to send up the copies of the bills of exception with the general record,¹ or sometimes, as in Georgia, the originals, and not the copies,² under certificate. Where the copies are required, and the original sent, the latter will not be entertained;³ but it is held, in Iowa, it will have no further injurious effect than to work a continuance to obtain a corrected transcript.⁴ And the copies transmitted are not to be controlled by the originals.⁵ In Wisconsin, it seems that either the original or a copy may be sent up with the record⁶ on writ of error.

§ 899. The next step is the assignment of errors thereon. A bill of exceptions cannot be made a substitute for a writ of error,⁷ nor for an assignment of errors. This, however, is limited by the record, so that error assigned on a point not embraced in the record proper, or brought in by a bill of exceptions, must not be considered.⁸

¹ *Fennow v. R. R.* 22 Iowa, 528.

² *R. R. v. Shorter*, 13 Ga. 300.

³ *Hobson v. Kissam*, 8 Ala. 365.

⁴ *Fennow v. R. R.* 22 Iowa, 528.

⁵ *Commonw. v. Thornton*, 14 Gray, 43.

⁶ *Orton v. Noonan*, 19 Wis. 357.

⁷ *Harris v. State*, 2 Kelly (Ga.) 213.

⁸ *Sierer v. Martin*, 63 Ill. 290.

In Alabama, there was no final judgment, and no writ of error, in a certain case, and the bill of exceptions was assigned as error. Held that it must be stricken from the docket.⁹

An irregularity, such as signing a bill of exceptions after suing out a writ of error, is waived by joinder in error.¹⁰

A writ of error may be dismissed, if the record is so confused that the status of the case below cannot be determined;¹¹ or if the evidence is insufficiently set forth in the bill, or the record is not certified in time;¹² or if the bill does not plainly specify the decision complained of;¹³ or if the record is of a case still pending below;¹⁴ or if the record is contained in loose, disconnected papers, insufficiently identified;¹⁵ or where the testimony is not set out in the body of the bill, and there are discrepancies in the paging.¹⁶

But in Florida, if there is a confused statement in the bill as to the rejection of material evidence, leaving it doubtful whether it was actually rejected, the cause will be remanded.¹⁷ And in Georgia, where an uncertainty can be removed by the record proper, it will be so done.¹⁸ In New York, redundancies may be stricken out on motion.¹⁹

§ 900. It has been held that if a plaintiff in eject-

⁹ *Harrington v. Merriweather*, 20 Ala. 607.

¹⁰ *Brown v. Bissell*, 1 Doug. (Mich.) 273.

¹¹ *Davis v. Meyers*, 41 Ga. 95.

¹² *Seay v. Treadwell*, *ibid.* 412.

¹³ *Smith v. Boatrite*, *ibid.* 413.

¹⁴ *Sparks v. Maxwell*, *ibid.* 421.

¹⁵ *Dye v. Mattox*, *ibid.* 425.

¹⁶ *Gas Co. v. Green*, 21 Iowa, 335.

¹⁷ *Pearson v. Grice*, 8 Fla. 214.

¹⁸ *Garner v. Keaton*, 13 Ga. 430.

¹⁹ *Harting v. People*, 4 Parker, 319.

ment does not offer evidence of title sufficient to put the defendant on his defence, he cannot be prejudiced by any erroneous ruling of the court in regard to such defence, and cannot therefore avail himself, upon a writ of error, of such erroneous ruling as a ground of reversal. But if the defects in the plaintiff's evidence be such as might have been supplied by the trial, had the objection been made and sustained, or if it does not clearly appear from the bill of exceptions that the plaintiff could not have been prejudiced by the erroneous ruling of the court in regard to the defence, the plaintiff is entitled to avail himself of such errors as a ground of reversal.²⁰

§ 901. Where the conclusion of a bill of exceptions stated that, "Whereupon the plaintiff at the time noted exceptions on the margin of a part of the charges given by the court to the jury, and at the time excepted to each of the charges severally upon which exceptions were noted on the margin thereof at the time," the court held itself unable to determine whether the plaintiff excepted to each and all of the instructions given, or only to such as had the exceptions noted on the margin. And to add to the embarrassment, the clerk had certified that there were no instructions on file so marked on the margin.²¹

§ 902. Where a bill is defective in any particular wherein an amendment is possible that will remove the defect, it may usually, on motion, be taken from the files for amendment by the court below. But not in the Supreme Court of the United States.²² Nor

²⁰ *Osborne v. Tunis*, 1 Dutch. (N. J.) 633.

²² *Stimpson v. R. R.* 3 How. (U. S.) 556.

²¹ *Cobb v. Kurtz*, 40 Ind. 324.

in Massachusetts, where, however, the bill may be amended, in the Supreme Court, without taking from the files, by an agreement of the parties, and consent of the judge below.²³ In that state, the judge below cannot himself amend after the bill has been entered in the Supreme Court, which, however, on his certificate of an error therein, may postpone or continue the cause for the purpose of allowing a hearing in the court below on the proposed amendment, the result to be certified to the Supreme Court.²⁴ On the hearing of the exceptions in the Supreme Court, it is too late to receive any certificate of error, unless both parties consent;²⁵ and more especially where the only effect of rejecting the amendment is to remand the cause for a new trial.

In Georgia, where the original must be sent up, it has been held that, where the original is lost, and a certified copy is brought up, a clerical error in the copy may be amended on agreement of counsel, and the copy established instead of the original.²⁶

In Wisconsin, held, that if appellant desires to correct an error, he should obtain leave to withdraw the record in order that the bill may, on amendment, be attached to it, and the whole returned by the clerk. And, on obtaining such leave, there is no need of further leave to withdraw the bill for amendment; after the order to take from the files, it is under his control. And after such withdrawal, the bill will not be reinstated without amendment.²⁷ While the bill is

²³ *Ashley v. Root*, 4 Allen, 505.

²⁶ *Gay v. Peacock*, 41 Ga.

²⁴ *McCanen v. McNulty*, 7

91.

Gray, 139.

²⁷ *Vroman v. Dewey*, 22 Wis.

²⁵ *Johnson v. Couillard*, 41-

360.

len, 446

thus absent for amendment, the case is still in the Supreme Court, and liable to be noticed for hearing.²⁸

In Illinois, a cause may be continued for amending a bill; as, for instance, by inserting omitted documentary evidence, on condition that proper diligence had been used to supply the deficiency before the motion to continue.²⁹

In Indiana, where a bill failed to show (although professing to set out all the evidence) that any evidence was adduced as to a levy or sale by the sheriff, or a deed thereon, it was held fatal in an action to set aside the sheriff's sale, and that the omission could not be supplied by amendment on parol testimony alone so as to embrace such evidence, since courts can only amend their records at a subsequent term "in a fact which appears to be the misprision or neglect of the clerk," unless there is something in the record to amend by.³⁰

A rehearing will not be granted by the Supreme Court in order to enable a party to have the record amended.³¹

Amendment can only be made by motion in the court below. When it is made, the Supreme Court can by *certiorari* compel the clerk to certify the amended record.³²

A suggestion of counsel, at the argument of the cause in the Supreme Court, that a statement in the bill of exceptions is erroneous, and was improperly

²⁸ Polhemus v. Bank, 27 Mich 45.

³¹ Warner v. Campbell, 39 Ind. 409.

²⁹ Brooks v. Bruyn, 40 Ill. 65.

³² Cluck v. State, 40 Ind.

³⁰ Hamilton v. Burch, 28 Ind. 266.

inserted in the bill after it was settled and signed by the judge, cannot be regarded where the proper steps to amend the record have not been taken.³³

§ 903. In Missouri, where a judge refuses to sign a bill, but permits one to be signed by bystanders, it becomes a part of the record. But otherwise if he refuses this permission, in which case the original is sent up, supported by affidavits filed in its support. The permission, when given, should be shown by the record.³⁴

§ 904. In Massachusetts, a petition to establish the truth of disallowed exceptions to be argued in the law term of the Supreme Court for the commonwealth, must be entered on the docket within a reasonable time after they are taken, and at the same term at which they would by law be entered if duly allowed and signed.³⁵ County terms have no jurisdiction in such case.

§ 905. A bill is regarded, in the appellate court of Virginia, as a demurrer to evidence when the cause was tried below without a jury, and all the evidence is therefore to be inserted therein;³⁶ although, in general, where there is really a demurrer to evidence, it has been held, a bill is unnecessary. (See 42 Ind. 294.)

§ 906. The undertaking on which suit was brought needs not be copied into the bill when it is embodied in the complaint.³⁷

³³ *Germann v. Schwartz*, 21 Wis. 669.

³⁴ *Downing v. Shacklett*, 49 Mo. 86.

³⁵ *Priest v. Groton*, 103 Mass. 530.

³⁶ *Hodge's Ex'r. v. Bank*, 22 Gratt. 51.

³⁷ *Smith v. Lisher*, 23 Ind. 505.

§ 907. The rules of court must be set out in the bill when the question is a matter of practice under those rules; as, for example, that a plea is offered and refused by the court below because, as alleged, it is not offered in the time prescribed by the rules of the court for the filing thereof.³⁸ And such rules must be certified like other matters of exception.³⁹

And so the roll of attorneys must be incorporated in the bill, where it is claimed that a certain person is not an attorney at law.⁴⁰

§ 908. A bill not settled according to the rules of court may, for such irregularity, be set aside on motion in the Supreme Court, or, under some circumstances, be sent back for amendment.⁴¹ And if a bill has been in any way obtained fraudulently, it may be set aside, if, also, it appears that it is untrue; not otherwise,⁴² since the party complaining must show not merely that his opponent has done wrong, but that the wrong deprived him of some right.⁴²

§ 909. Where papers filed with a bill, and referred to by it, are destroyed by fire, the exceptor cannot be allowed to supply its loss by *ex parte* affidavits. The matter would seem to be without remedy unless some copy has been preserved, although the Supreme Court of Vermont intimate that, perhaps, where the loss is wholly without the fault of the exceptor, and he files affidavits in time for counter affidavits to be also filed,

³⁸ Packet Co. v. Sickles, 19 Wall, 611.

³⁹ Rutherford v. Pope, 15 Md. 581.

⁴⁰ Lyon v. Boilvin, 2 Gil. 636.

⁴¹ Tollensen v. Gunderson, 1 Wis. 110.

⁴² R. R. v. Simpson, 11 Kan. 498.

this might be allowed.⁴³ Where the loss or absence of a paper referred to is not accounted for, it is evident there is no help for it.⁴⁴

A defect of evidence in a bill taken during the progress of a trial may, in Virginia, be supplied by reference to an exception taken at the close, and containing all the evidence, and although the evidence considered in determining the question raised by the prior bill had not been introduced when the exception was taken.⁴⁵ But this matter cannot arise under the general practice of saving the points only during the trial, and putting all into a general bill at the close of the trial.

§ 910. Where exceptions were taken, and yet execution was not stayed, and four days before the session of the Supreme Court the exceptor notified the opposite party that he would not prosecute his exceptions, and afterwards desired the court to strike the case from the docket as a misentry, the court refused, and held that he must elect to be heard on the exceptions or submit to an affirmance of the judgment below, since striking off would not settle anything, but leave the exceptor free to bring a writ of error afterwards.⁴⁶ And where exceptions are allowed with a stay of execution, and the exceptions are actually filed, if afterwards they are abandoned, the recovering party will be entitled to an affirmance to save liens on property and bail where these exist; and, to save

⁴³ *Fish v. Field*, 19 Vt. 141.

⁴⁴ *Walton v. Smith*, 8 Ired. (N. C.) 521.

⁴⁵ *Perkins's Adm'r v. Hawkins's Adm'r*, 9 Gratt. 660.

⁴⁶ *Allen v. Hard*, 19 Vt. 606.

deciding every case on its particular facts, this rule is strictly observed in Vermont.⁴⁷

§ 911. It is ground for a reversal in Massachusetts that final judgment was entered after exceptions were allowed, and before they were entered in the Supreme Court.⁴⁸

§ 912. A remittitur is not allowed in a case brought up on exceptions in Maine.⁴⁹ But it is otherwise in Iowa.⁵⁰

§ 913. A governor's proclamation under a statute will be judicially noticed by the court, even when used as evidence, and so needs not be set out in a bill of exceptions.⁵¹ But a pardon issued while exceptions are pending will not be judicially noticed, but must be availed of by the prisoner's waiving his exceptions and pleading the pardon, whereupon he will be discharged.⁵²

§ 914. In New Hampshire, on a case made, a decision excepted to and the exception thereon may be implied from what is stated, and need not be expressly stated.⁵³

§ 915. Although it is, as we have seen, the general rule that no question is to be raised above which was not decided upon below, yet this rule is not to be carried to the extent of prohibiting the consideration

⁴⁷ *Batchelder v. Tenney*, 1 Williams (Vt.) 785.

⁴⁸ *Gassett v. Cottle*, 10 Gray, 375.

⁴⁹ *Greenleaf v. Hill*, 30 Me. 165.

⁵⁰ *McNorton v. Akers*, 24 Iowa, 369.

⁵¹ *Ragland v. Baringer*, 41 Ga. 114.

⁵² *Commonw. v. Lockwood*, 109 Mass. 323.

⁵³ *Claggett v. Simes*, 11 Foster, 56.

of collateral questions essential to the decision, and plainly arising on the facts.⁵⁴ And, in Massachusetts, it has been held that, where facts stated in a report of the evidence adduced at the trial of a cause, and conceded by both parties, show an objection to the plaintiff's recovery which cannot be removed by further proof, the court will consider such objection open, though it was not raised at the trial.⁵⁵

⁵⁴ *Fay v. Breckenridge*, 7 B. Mon. (Ky.) 33

⁵⁵ *Slater v. Rawson*, 1 Met. 450.

SUPPLEMENT.

PREFATORY NOTE.

I have much reason to be grateful to the profession for the very favorable reception this work has had from them; and, also am gratified that Messrs. MILLS & Co. have secured the plates, and propose to issue a revised edition. At present, the only revision it seems to need is, to bring it down to the present time as nearly as may be, which can be done sufficiently by means of this Supplement. And, for convenience of reference, I subjoin a table of the latest reports included herein.

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SUPPLEMENT.

CHAPTER I.

QUESTIONS OF LAW AND FACT.

§ 1. It will be remembered that the court has no right in any case to submit a question of law to the jury, and therefore it cannot be allowed to submit evidence hypothetically to the jury, to be considered by them, if they judge it applicable to the case in hand, but if they judge otherwise, to be disregarded. The admissibility, and hence the pertinency or relevancy of the evidence is wholly for the court.¹ When the court has admitted it, the jury are to judge of its credibility and its sufficiency. And they are to be left wholly free to judge of the credibility of all witnesses testifying in the case at bar, and where there is a direct conflict in testimony, they are to determine the credibility from the circumstances usually attending such transactions as the one in suit, from the inherent reasonableness of the testimony on the different sides respectively, and from all the available circumstances which bear upon the question.² And, if the evidence is evenly balanced, it is no part of the court's province to bolster up in the slightest degree the testimony of either side, even by an instruction so trivial in appearances that "it is not always to be expected of a witness that he should remember

¹ *People v. Ivey*, 49 Cal., 56.

² *Haines v. People*, 82 Ill., 430.

the dates of occurrences a year back.”³ The question must be left wholly unbiassed by any influence on the part of the court, direct or indirect. And the court is not to tell the jury what is the better kind of evidence on a question in controversy.⁴ Nor is it proper to instruct a jury that if the circumstances of the testimony “strike their minds as being an unreasonable story to the extent of removing a fair presumption of its truth from their minds,” they should find, etc.⁵ For if there is in the nature and character of the testimony introduced sufficient fairly to raise any issue proper for their consideration, they are to be left to judge for themselves the bearings of the evidence upon that issue.⁶ Hence it is erroneous for a court to instruct that if the jury believes the testimony of a certain witness, their verdict should be for a particular party.⁷ This is invading the province of the jury.⁷ “Conflicting evidence is to be weighed by the jury, and the court would be going beyond its province if it undertook to instruct them what inference they should draw from the facts submitted to them, or what weight or credibility they should attach to the evidence offered by the respective parties.”⁸ Nor can the court, unless there is a total want of evidence, undertake to direct the verdict and declare that “the evidence is not legally sufficient to entitle the plaintiff to recover.”⁹ And, on the same principle, the court cannot determine the preponderance of the evidence,¹ which would be to usurp the functions of the jury *in toto*, and so it is a question of fact whether the testimony of a legatee is sufficient to overcome the presumption of the payment of a legacy.²

§ 2. However, it is held that where a controversy depends on written correspondence put in evidence, the authenticity and bearing of which are undisputed, the court is to expound it,

³ *Shaw v. People*, 81 Ill., 150.

⁴ *R. R. v. Brooks*, 81 Ill., 245.

⁵ *Palmer v. Meiners*, 17 Kan., 481.

⁶ *Merriam v. Lumber Co.*, 23 Minn., 321.

⁷ *R. R. v. Judson*, 34 Mich., 507.

⁸ *Lyon v. George*, 44 Md., 303.

⁹ *Bullock v. Hunter*, Id., 423.

¹ *Hough v. Cook*, 69 Ill., 581.

² *Kingman v. Kingman*, 121, Mass., 249.

and instruct the jury directly and distinctly as to its legal effect upon the issue, and not to leave it to the jury to interpret and construe it.³ This seems to rest on the general power and duty of the court to interpret and construe all written instruments as matter of law, which is the settled rule, although where no injury is done by leaving the question of the legal effect of an instrument to a jury—that is, if on inspection it appears that no different verdict could have been found consistently with all the facts, a court of review will not disturb their verdict because of such submission of the instrument to their interpretation.⁴ But interpretation usually belongs to the court, and where the language of a writing is ambiguous, the court should inform the jury of its meaning.⁵ And, so, it was held that the court erred in submitting a policy of insurance to the jury to determine whether a word was written *six*, and so was sensible, or was writted *oix*, and therefore was devoid of meaning.⁶ Even the meaning of ordinary words in a written contract must be determined by the court, as, for example, the meaning of the word “feeding” in a contract for the sale of cattle.⁷ Also, the duties enjoined by the contract must be decided by the court. And so it was held error for the court to submit to the jury whether the plaintiff “was bound to properly and carefully feed, shelter, herd and protect said sheep and their increase,” by the written contract in evidence.⁸ And also, where the question was submitted whether a certain writing was a guaranty or not, it was held erroneous.⁹

§ 3. But parol evidence to impeach a written instrument, goes, necessarily, to the jury; as, for example, the official certificate of acknowledgement of a deed. And where a court decided that the parol evidence offered for that purpose was

³ Battershall v. Stephens, 34 Mich., 73.

⁴ Stadden v. Hazard, 34 Mich., 76.

⁵ Ogden v. Kirby, 79 Ill., 556.

⁶ Ins. Co. v. Doyle, 30 Mich., 159.

⁷ Lowry v. Megee, 52 Ind., 107.

⁸ Rohrabacher v. Ware, 37 Iowa, 88.

⁹ Andrews v. Tedford, 37 Iowa, 314.

conclusive as to the validity of the certificate, it was held error as withdrawing a question of fact from the jury.¹

§ 4. And so as to external circumstances bearing upon the terms of a contract. The court determines what those terms mean, but whether they are fulfilled or not belongs to the jury. For example, where the contract in writing was to complete a building ready for occupancy, it was held to be a question for the jury whether the erection of a certain out-building was necessary to make it ready for occupancy.²

§ 5. On the general principle, the construction of a town plat belongs to the court; for "if the plat is not, in the strict and narrow sense of the word, a written instrument, it is so closely analogous to one as to fall within the reason of and be governed by the general rule which confides the construction of written instruments to the court and not to the jury."³ But in a case where a deed partially describes land, and partly refers to a plan, it has recently been held in Massachusetts that the question whether the description of the land by words and by reference to the plan is sufficient to identify the land with reasonable certainty, is a question of fact,⁴ which seems to be an exception to the general rule.

§ 6. As to the meaning of an ordinance, as applicable to an act which is claimed to be a violation thereof, the following is the syllabus of a recent Massachusetts case: "On a complaint for standing on a street and selling newspapers in violation of an ordinance of the city of Boston providing that 'no person shall stand on any street for the sale of any article unless duly licensed,' a witness for the government testified that the defendant, on the day named in the complaint, came into a certain street and sold newspapers; that he would stand for about five minutes and then move a little, moving backwards and forwards within a space of fifteen feet. The judge in-

¹Hester v. Glasgow, 79 Pa. St., 83.

²Cunningham v. Washburn, 119 Mass., 224.

³Hansen v. Eastman, 21 Minn., 511.

⁴Kohlhepp v. West Roxbury, 120 Mass., 596.

structed the jury that if the defendant stopped in the manner described by the witness for the government, he was guilty of standing, in violation of the ordinance. *Held*, that the ruling was erroneous; and that the case should have been submitted to the jury upon all the evidence, with proper instructions.⁵

§ 7. In regard to a parol contract the terms are for the jury, although even as to this the legal effect and construction are for the court.⁶ As, for instance, what is a "legal transfer" of property is held to be a question which a jury is incompetent to decide.⁷ An agreement to compromise a suit belongs to the jury, it seems.⁸

§ 8. Where there are a written agreement and a contemporaneous parol agreement, it has been held a question of fact for the jury whether allowances made subsequently and in excess of those made in the written contract, were intended by the parties as an adoption of the verbal agreement to modify the terms of the written one.⁹ And where there is a doubt as to the intention of parties to a verbal contract the question is for the jury to decide what agreement was made.¹⁰ And so, whether a vendor of land had taken, in full satisfaction for the price, a promissory note indorsed "without recourse," is held a question of fact;¹¹ and whether the acceptance of an offer was conditional or absolute,¹ and whether certain payments were conditions precedent or not.² It belongs to the jury to determine who are the parties to a contract, as, for instance, whether credit was given to a contractor, or his sub-contractors.³ Also, whether there was a warranty verbally given.⁴ And, where the condition of a railroad subscription is that the railroad should be completed to a certain point by a certain

⁵Commonwealth v. Elliott, 121 Mass., 367.

⁶Belden v. Woodmansee, 81 Ill., 27.

⁷Myers v. King, 42 Md., 66.

⁸Collins v. Barnes, 83 Pa. St., 19.

⁹Courtenay v. Fuller, 65 Me., 160.

¹⁰Swanner v. Swanner, 50 Ala., 67.

¹¹Root v. Burt, 118 Mass., 521.

¹Clendenen v. Pancoast, 75 Pa. St., 215.

²Jenness v. Shaw, 35 Mich., 20.

³Briscoe v. Eckley, 35 Mich., 112.

⁴Warren v. Coal Co., 83 Pa. St., 437.

day, it is a question of fact whether the condition was fulfilled by the completion of the road to the given point at the time designated.⁷ Whether a husband acted as the agent of his wife, in a particular transaction, is for the jury to decide.⁸ And, where a seller agrees to sell an article at the "cost price," it is a matter of fact whether the sale was at actual cost, or at a sum falsely declared to be the cost by the seller. In such a case the court said: "A sale at cost is a valid sale for whatever the cost may actually be, when correctly ascertained, although supposed to be, or represented to be, a different sum, at the time of sale; and both parties are bound by that standard unless the contract can be avoided for fraud or mutual mistake. That the price can be made certain makes it certain; but a sale for a fixed price and definite consideration binds the parties at such price, although the sum paid was supposed to be the cost price, when it was not. In the one case the supposed 'cost' merely induces a contract to be made; in the other the real cost becomes a material part and condition of the contract itself."⁹

§ 9. Whether, under a condition of a policy of insurance that any increase of hazard or material change shall avoid the policy, the non-occupancy of the premises when it was destroyed by fire, was such an increase of risk, or material change, as to amount to a violation of the condition, is a question of fact.¹

§ 10. It is held that, "on the issue whether a person employed to burn the brush upon the land of another had authority also to burn the brush within the limits of a highway adjoining, from which it is separated by a wall, the question whether a direction by the owner to 'clear up the land' included land within the limits of the highway is for the jury, although the estate of the owner extended to the middle of the highway."²

⁷ *Ogden v. Kirby*, 79 Ill., 556.

⁸ *Ferguson v. Spear*, 65 Me., 277.

⁹ *Willard v. Randall*, 65 Me., 86.

¹ *Cornish v. Ins. Co.*, 10 Hun., 466.

² *Knight v. Luce*, 116 Mass., 586.

§ 11. The question of waiver being one of intent, to be inferred from surrounding circumstances, as, for instance, concerning irregularities of proof of loss under an insurance policy, belongs to the jury as a question of fact.³ And so, as to a waiver of demand and notice in regard to a promissory note; it is not legally to be inferred, from doubtful or equivocal acts or circumstances, but the jury are to be left, in such case, to determine the matter.⁴

§ 12. The sufficiency of an acknowledgment in writing to take a case of a promissory note out of the bar of the statute of limitations, is held to belong to the court as a question of law; but it is a question of fact for the jury to decide whether a particular acknowledgment refers to the note on which the action is brought.⁵

§ 13. In regard to notice and knowledge, it is held that where a notice is in writing, or where the facts are not controverted, the sufficiency of the service thereof is for the court; but if either the fact of service or the authority of the agent who made it, or of the agent of an incorporated company on whom it is served, is disputed, the jury must determine the matter.⁶ And, where one took out an insurance policy on property under mortgage, and the policy provided that a failure on the part of the insured to notify the company of any mortgage existing would avoid the contract of insurance, the fact whether the company knew of the mortgage when it issued the policy is to be determined by the jury.⁷ And, where goods delivered under an executory contract of sale are not of the prescribed quality, and the purchaser notifies the seller to take them back, it is for the jury to say whether such notice was in apt or reasonable time or not.⁸ And it belongs to the jury to decide whether the owner of a vicious dog had a knowledge of the animal's propensity to mischief and injury.⁹

³Insurance Co. v. O'Connor, 29 Mich., 241.

⁴Pratt v. Chase, 122 Mass., 265.

⁵Warlick v. Peterson, 58 Mo., 408.

⁶Cole v. R. R., 38 Ia., 311.

⁷Ins. Co. v. Todd, 83 Pa. St., 212.

⁸Doane v. Dunham, 79 Ill., 131.

⁹Keenan v. Hayden, 39 Wis., 559.

And, so, in an action for an injury by a defective sidewalk under repair, the sufficiency of a barrier erected to give notice to passers-by of the extent of the repairs and the consequent danger, is a question of fact.¹

§ 14. Where an action is brought on a promissory note on the face of which is an apparent alteration in the date, it is for the jury to say whether the alteration was made before or after the delivery.²

§ 15. As to adverse possession, its limits or boundaries are to be decided by the jury.³ And, also, under which of two conflicting titles—one by deed, the other by mere adverse possession—one is in possession of land.⁴

§ 16. A matter of locality may, in some circumstances, be a mixed question of law and fact, as, for example, whether a certain place is a railroad station within the meaning of a statute prohibiting a railroad company from abandoning a station.⁵

§ 17. And so as to what is a perversion of a power established by will, it is a question of law for the court; but, whether the circumstances of a particular case amount to a proof of such perversion is a question of fact for the jury.⁶

§ 18. Where the question of necessities arises, as, for example, whether a sewing machine is such a necessary as that a husband can be compelled to pay for it, the matter must be determined by the jury.⁷

§ 19. An instruction to the jury, that "it is incumbent on the plaintiff to make out his case so far as he has the affirmative, by a preponderance of testimony" is erroneous, unless the court will likewise inform them in what respect the plaintiff has the affirmative. On this the Illinois court has said, "whether the plaintiff or defendant has the affirmative on a

¹ *White v. Boston*, 122 Mass., 491.

² *Newman v. Wallace*, 121 Mass., 323.

³ *Hale v. Rich.*, 48 Vt., 218.

⁴ *McIntire v. Talbot*, 62 Me., 312.

⁵ *State v. New Haven etc. Co.*, 41 Conn., 137.

⁶ *New v. Potts*, 58 Ga., 420.

⁷ *Willey v. Beach*, 112 Mass., 559.

particular issue, is a question of law for the court, and not one of fact for the jury, and it is not proper that it should be left for them to determine, whether the plaintiff or defendant has the affirmative, or to what extent it is incumbent on either to have the preponderance of evidence." ⁸

§ 20. The intention of a landlord in interfering with the tenant's possession and enjoyment of the demised premises, fixing the character of the landlord's act as a trespass or an eviction, must be determined by a jury, on a question whether acts complained of do, or do not, amount to such an eviction as to release the tenant from the payment of rent.⁹

§ 21. And, indeed, intention is usually, or always, a question of fact. And it is so in regard to fraud in written instruments, as for example, as to a conveyance from husband to wife alleged to be fraudulent.¹ In all cases fraud must be proved and the evidence submitted to the jury.² For no representations however false, amount to fraud in law unless it be of a fact material to the contract or transaction, and it is for the jury to say whether a representation was intended to be the statement of a fact, and so determine from all the circumstances whether there really was, or was not, an actual fraud.³ And thus it is in regard to malice, which likewise rests in the intention, as for example, where one is in a position to make a privileged communication to another, and does so by a letter, and the question is whether the communication was fairly or maliciously made, the jury is to decide.⁴ And correspondingly in an action for malicious prosecution, the matter of probable cause is to be determined by the jury.⁵ And if the facts proved are capable of different inferences, it is for them to determine what would be the belief and action of prudent men under like circumstances.⁶

§ 22. In regard to negligence, it is held to be a question of

⁸ *Gilbert v. Bone*, 79 Ill., 345.

⁹ *Lynch v. Baldwin*, 69 Ill., 210.

¹ *Monteith v. Bax*, 4 Neb., 166.

² *Larrabee v. Sewall*, 66 Me., 384.

³ *Banta v. Savage*, 12 Nev., 152.

⁴ *Atwill v. Mackintosh*, 120 Mass., 177.

⁵ *McWilliams v. Hoban*, 42 Md., 56.

⁶ *Heyne v. Blair*, 60 N. Y., 19.

law where the facts are admitted, or established by uncontradicted evidence.⁷ But as to what acts of a shipper constitute negligence releasing the carrier from liability, it must be passed upon by the jury.⁸ The general rule is thus stated by the Kansas court: "This question of negligence is said to be a mixed question of law and fact; when the facts are disputed it makes a question for the jury; where the facts are undisputed, and but one deduction is to be drawn from them, there is simply a question of law for the court. But where the facts though undisputed are such that when taken singly or in combination different minds will come to different conclusions as to the reasonableness and care of the party's conduct, the question is one which may properly be left to the determination of the jury."⁹ And the New York court say: "The question of negligence depends very much upon circumstances, and is addressed to the judgment of men of ordinary prudence and discretion, and is ordinarily for the jury. When the inferences to be drawn from the proof are not certain and incontrovertible, it cannot be decided as a question of law by directing the verdict or non-suit, but must be submitted to the jury."¹ And it is the same as to direct negligence or contributory negligence.²

Where the precise duty is determinate and the same under all circumstances, as for example a neglect to sound a whistle required by law, the question of negligence is a question of law,³ although of course it is for the jury to decide upon the fact whether or not, the whistle was actually sounded. Where there is no dispute the court must decide. Thus in regard to negligence in setting up the defense of the invalidity of a promissory note, the Maine court said on the matter: "What constitutes negligence in a case like this where the facts are clear and unequivocal, is a question of law. The testimony of the defendant is uncontradicted; no fact is in doubt or

⁷*Fleming v. R. R.*, 49 Cal., 253.

⁸*Cobb v. R. R.*, 33 Ia., 603.

⁹*R. R. v. Pointer*, 14 Kan., 53.

¹*Thurber v. R. R.*, 60 N. Y., 331.

²*McNamara v. R. R.*, 50 Cal., 581.

³*R. R. v. Stinger*, 78 Pa. St., 219.

dispute; no question about interest or motive to be judged of; there are no attendant circumstances or exigencies to be weighed or considered, affecting the rights of the parties; the whole evidence, with all possible inferences which can legitimately be based upon it, cannot exculpate the defendant from the negligence imputed to him. Therefore, it was not competent for the judge to make the deduction upon the facts that he did make. The point was one of law and not of fact, and wrongly decided. This conclusion is well sustained by the authorities."⁴

Whether the failure to stop a train, in order to avoid injuring an infant playing on the track was negligence, belongs to the jury to determine.⁵

Due care upon the part of a person injured whether by a public or private conveyance belongs to the jury,⁶ as to a horse railroad,⁷ or as to attempting to pass another vehicle in a manner forbidden by statute, and being thereby injured by reason of a defect in the highway,⁸ or as to an injury by slipping, while traveling on a highway on foot,⁹ or stepping into a hole,¹⁰ or as to injury from leaving a seat in a railroad car before the car entirely stops its motion,¹¹ or as to being struck by a moving car while crossing a railroad track.¹²

Where the matter is one of ordinary care, it belongs also to the jury, and where there was room for discretion in the injured person at the time of the accident especially.¹ And in all cases as to the degree of care, as on the question of "due care."²

Also, the question of reasonable management of an engine is for the jury.³ And whether the failure to ring a bell or sound a whistle actually caused an injury is to be left to the jury,

⁴ Kellogg v. Curtis, 65 Me., 63.

⁵ Walters v. R. R., 41 Iowa, 71.

⁶ Carland v. Young, 119 Mass., 150.

⁷ Hawks v. Northampton, 121 Mass., 10.

⁸ Smith v. Conway, Id., 216.

⁹ Hunt v. Salem, Id., 294.

¹⁰ Woods v. Boston, Id., 337.

¹¹ Barden v. R. R., Id., 426.

¹² Hinckley v. R. R., 120 Mass., 257.

¹ Larrabee v. Sewell, 66 Me., 380.

² Joyner v. Great Barrington, 118 Mass., 463.

³ Macomber v. Nichols, 34 Mich., 213.

where the statute makes the company responsible for such injury as results from the neglect. Thus the Illinois court say thereon: "Whether the failure to ring a bell or sound a whistle as required by the statute, was the cause of the injury was a question for determination by the jury. The statute only imposes liability for injuries resulting from that neglect of duty; and where it appears that the non-compliance with the statute did not result in injury, no such cause of action would arise, because of the non-compliance with the statute."¹

It also belongs to the jury to determine whether at the time an injury was received by means of a public conveyance the injured party was a passenger, and so entitled to the protection to be accorded to a passenger peculiarly.²

Also, in a matter of private injury, whether the injured person was a trespasser when the accident occurred, as, for example, by falling through a trap door in a shop.³

Whether a sidewalk is really defective, is a question of fact.¹

Whether a loss by theft of deposits in a bank resulted from the negligence of the bank, is also a question of fact.²

§ 23. A case arose in Pennsylvania in 1877, which presents clearly the rule of injury from negligence in private business, as a matter of fact, and the court therein say: "It is true that where no duty is owed no liability arises. If, therefore, one leaves a stick of timber standing upright against his wall, or an open pit in his private yard to which others have not access, and a person strays in without invitation, or comes in without right, and pulls down the timber upon himself or falls into the pit, he can have no action against the owner of the yard for the alleged negligence. He had no business there, and the owner owed him no duty. But it has often been said duties arise out of circumstances; hence, where the owner has reason to apprehend danger, owing to the peculiar situation of his property and its openness to *accident*, the rule will vary.

¹ R. R. v. Benton, 69 Ill., 176.

² Buffett v. R. R., 40 N. Y., 168.

³ Gilbert v. Nagle, 118 Mass., 278.

¹ Burt v. Boston, 122 Mass., 223.

² Bank v. Boyd, 42 Md., 57.

The question then becomes one for a jury, to be determined upon all its facts of the probability of danger, and the grossness of the act of imputed negligence. Such was the nature of this case. This building was a factory in which several kinds of business were carried on in different stories, requiring the use of a hoisting apparatus above and an inclined plane below for the easy carriage of heavy articles, machinery, etc., into and out of the factory. These appliances were approached by means of a private opening or cartway shut in by a gate which their use required to be often opened for the ingress of wagons and hands engaged in the business. The gate and passage way opened out upon a public and much frequented street, where persons were passing and children playing. Unlike an ordinary private alley this passage was often opened, and, therefore, liable to the incursions of children, and even grown persons, from thoughtlessness, accident or curiosity. Now, the inclined way which did the injury was a dangerous trap; it was a heavy platform weighing eight or nine hundred pounds, attached by hinges within eighteen or twenty inches of the wall, and when lowered it fell across the cartway; when not lowered it stood upright against the wall, leaning so little beyond the center of gravity that a jar or slight pull would cause it to fall forward. Its fall in this instance caught four children beneath it; one had his back broken, another his hands mashed, and two escaped under the cavity. It was held up by no hook or other cavity, but merely rested by its own slight weight beyond the equipoise, ready, therefore, to catch children like mice beneath a deadfall. When wagons passed it was often held up by hand, and a witness saw it fall against the wheels. Now can it be righteously said that the owner of such a dangerous trap, held by no fastening, so liable to drop, so near a public thoroughfare, so often open and exposed to the entries of persons on business, by accident or from curiosity, owes no duty to those who will probably be there? The common feeling of mankind, as well as the maxim *sic utere tuo ut alienum non lædas*, must say this cannot be true

—that this spot is not so private and secluded as that a man may keep dangerous pits or deadfalls there without a breach of duty to society. On the contrary, the mind impelled by the instincts of the heart sees at once that in such a place, and under these circumstances, he had good reason to expect that one day or other some one—probably a thoughtless boy in the buoyancy of play—would be led there, and injury would follow; especially, too, when prompted by knowledge that a fastening was needed. Perhaps the best monitor in such a case is the conscience of one who feels in his dreadful recollection the crushing sense that he had left such an engine of ill to take the life of an innocent child. Such, too, is the humanity of the law that one may not justifiably, or even excusably place a dangerous pitfall, a wolf trap or a spring-gun purposely to catch and injure even willful trespassers poaching on his grounds. The common feeling of mankind, guided by the second branch of the great law of love and the common sense of jurors, must be left in such a case to pronounce upon the facts. We see no error, therefore, in submitting this case on its facts to the verdict of a jury. The verdict when approved by the court must be permitted to stand, for we take it no judge who sees manifest injustice done by the verdict will permit it to stand. An upright judge does his duty quite as well when he strikes down a false and unjust verdict as when he approves of that which he cannot condemn.”³

§ 24. It is held that on a question whether a judgment sought to be enforced at suit of a discharged bankrupt was rendered for fraud committed by the defendant, the determination of the matter is with the court, and it is improper to leave it to a jury, because it is to be concluded by an inspection of the record.⁴

§ 25. Although the extent of a patented invention is to be determined by the specification, which must be construed by the court, yet whether a patented invention is or is not an

³Hydraulic Works Co. v. Orr, 83 Pa. St., 335, Paxson, J., dissenting.

⁴Flanagan v. Pearson, 42 Tex., 1.

infringement of a prior invention is a question of fact for the jury,⁹ and so it belongs to them to decide whether the specifications of two patents, not expressed in the same terms, describe the same invention, since in such case the identity does not appear on the face of the two descriptions.¹⁰

CHAPTER II.

INSTRUCTIONS AND CHARGES TO JURIES.

§ 26. A mere question of law is not to be referred to the jury, as for example whether an assignment of an interest in a claim is of such a nature as to give the assignee a legal valid enforceable right therein.¹ The legal effect of a written instrument is for the court to state to the jury.² And so a court must not leave to a jury to decide what is in evidence.³ And a court is not to instruct a jury what *the presumption of law is* on any disputed question of fact.⁴ Nor submit to them the determination of what constitutes a legal justification or excuse.⁵

§ 27. The leading principle of a charge or instruction is, that it must be applicable to the issues and evidence in the case, and hence not abstract. If an instruction is not applicable to the issues or the evidence, and is in itself calculated to mislead, it is fatal to the case if the verdict be for the party obtaining the instruction.⁶ Hence, an instruction must involve the issues raised by the pleadings,⁷ and must therefore discriminate the issues actually raised,⁸ and in so doing, may state

⁹Jackson v. Allen, 120 Mass., 76.

¹⁰Hawkes v. Remington, 111 Mass., 175; Ballin v. Taggart, 17 How., 74; Bischoff v. Wethered, 9 Wall., 812.

⁶Whitney v. Cook, 53 Miss., 552.

²Galloway v. R. R., 57 Ga., 512.

³Bank v. Schley, 53 Ga., 369.

⁴Insurance Co. v. Hogan, 80 Ill., 42.

⁵Garvey v. Wayson, 42 Md., 178.

⁶Aultman v. Lee, 43 Ia., 404.

⁷Miller v. Balthasser, 78 Ill., 302.

⁸Bernhard v. Insurance Co., 40 Ia., 442.

what has been admitted and what contended for.⁹ And it has been held in West Virginia that the rule applies to an issue directed out of chancery.¹ The substance of the charge then must be conformable to the declaration.² And a rule of law so general as not to be practically useful at some point where the case presses has no need to be charged upon,³ or any outside of the issue and but remotely connected with it.⁴ For example, if in defense to an action on a promissory note the plea relies upon the statute of fraud and circumvention which spoils a note even in the hands of an innocent holder for value, it is error for the court to charge the jury concerning notice and diligence of the assignee.⁵

No abstract principle of law, however correct, should be given in charge, since there is always danger of these misleading the jury to adapt the evidence to the law as charged, by a false gloss and actual though unintentional perversion. And hence, the giving of an instruction in a case without any applicable evidence to the prejudice of the adverse party, is, of itself, a sufficient ground of reversal.⁶ And the evidence should be fairly sufficient to raise the question involved in the instruction.⁷ For instance, although the plea may allege an assignment and the acceptance of such assignment as payment for certain notes, and secondary evidence is given thereon without laying a proper foundation therefor, it is error to base any instruction upon the fact of such assignment and acceptance.⁸ All the facts must be embraced and not a single isolated fact drawn out and presented, because to take a fact out of its true relations and connections tends to give a false view of it and of the case involving it. As, for instance, "if a fact is to be found by a jury, the existence of which is to be determined by a variety of facts and circumstances, it is

⁹Weeks v. Cottingham, 58 Ga., 559.

¹Henry v. Davis, 7 W. Va., 715.

²Jowers v. Baker, 57 Ga., 81.

³The Mayor, etc., v. Inman 57 Ga., 370.

⁴The Mayor, etc., v. Hill, 58 Ga., 595.

⁵Hewett v. Johnson, 72 Ill., 515.

⁶Case v. R. R., 38 Ia., 581.

⁷Straus v. Minzesheimer, 78 Ill., 497.

⁸American v. Rimpat, 75 Ill., 231.

not the right of a party to require of the presiding judge to rule that one or more of these facts and circumstances taken separately and not in connection with the other facts and circumstances, is of itself insufficient to authorize the finding of the main fact. But the judge may properly state to the jury the exact fact or state of facts necessary to be proved in order to establish the claim or defense, and leave the jury to determine upon all the competent evidence in the case whether the fact to be established is proved.⁹ And so in a criminal case, a court may refuse to give an instruction based on the jury's believing certain evidence apart from other evidence when this evidence included in the instruction is equally consistent with the guilt or innocence of the defendant. The whole subject must be embraced in the instructions.¹

Where a jury has nothing to do with affixing the penalty in a criminal case, they should not be charged concerning the law regulating the penalty.² And if such a charge is given, it is held to be a fatal error, in Texas.³

⁹ *Packer v. Locomotive Works*, 122 Mass., 490.

¹ *Commonwealth v. Carroll*, 122 Mass., 18.

² *Russell v. State*, 57 Ga., 421.

³ *Robinson v. State*, 2 Tex. Ct. of Appeals, 390. On the points included in the section above, the authorities are all agreed, and I therefore judge it sufficient to merely indicate the recent cases. As to conformity to issues or pleadings, see *Wright v. Jacobs*, 61 Mo., 19, where it is held that an instruction allowing a jury to give more than the amount claimed in the pleading is error. As to abstract instructions, see *Faulk v. State*, 51 Ala., 15; *Drake v. State*, Id. 30; *Pugh v. State*, 2 Tex. Ct. of Appeals, 539; *Albrecht v. Walker*, 73 Ill., 70; *Smith v. People*, 74 Ill., 144; *Rupley v. Daggett*, Id., 351; *Creed v. People*, 81 Ill., 566; *Casper v. R. R.*, 44 Ia., 135. As to inapplicable instructions not based on the evidence, see *State v. Osborne*, 45 Ia., 425; *State Savings, etc. v. Hunt*, 17 Kan., 532;

Wagner v. Robinson, 56 Ga., 47; *Northington v. Faber*, 52 Ala., 45; *Davis v. Fairclough*, 63 Mo., 61; *Weiland v. Weyland*, 64 Mo., 168; *Clark v. R. R.*, Id., 440; *Mayfield v. State*, 44 Tex., 59; *Perry v. State*, Id., 473; *Norvell v. Phillips*, 46 Tex., 162; *Browning v. State*, 1 Tex. Ct. of Appeals, 96; *Priesmuth v. State*, Id., 430; *Shepherd v. People*, 72 Ill., 480; *Express Co. v. Milk*, 73 Ill., 224; *Geary v. O'Neil*, Id., 593. As to singling out facts and not taking in *all* the evidence, see *McNamara v. Dratt*, 40 Id., 415; as singling out a witness, *Jackson v. Commissioners*, 76 N. C., 232; or particular facts, *Bryson v. Chisholm*, 56 Ga., 296. The exception to it is, that to justify a charge on a given point, there does not need to be direct evidence going to the point, but it is sufficient if there is something from which a legitimate process of reasoning can be carried on in regard to it. *Holland v. Long*, 57 Ga., 41. And, further, that a party has a right to request

§ 28. And injury may be done by charging with a stress upon immaterial facts and circumstances. Thus, the Texas Court of Appeals has remarked very clearly on this matter in a certain murder case: "From the foregoing free and literal extracts, it will be seen that when the court comes to instruct the jury as to the law of the case as made by the evidence, commencing with the form of the charge set out as above, importance is attached to and stress laid upon the subject of the theft of the property said to have been stolen; and the guilt or innocence of the party charged with the crime of murder is made to depend in a great measure upon what the jury may believe the facts to be with regard to the theft of the property, and attending the deceased in his search after it, and his efforts at his recovery and the detection and arrest of the thief."⁴

§ 29. An instruction must not assume facts not in the case, since this is perhaps even more misleading than one embracing a mere abstract question of law. Misguidance is almost inevitable.⁵ And moreover, it causes the court to usurp the province of the jury sometimes as where the assumed fact is involved in the case as a point of controversy.⁶ Thus, where the charge turns upon the assumption of circumstantial evidence when there is no circumstantial evidence in the case it is fatal error, being calculated to mislead the jury.⁷

instructions based on a hypothesis which the evidence in his favor tends to establish; such charges are allowable, because the opposite party may request charges founded on the contrary hypothesis if he has evidence to sustain it. *Griel v. Marks*, 51 Ala., 566. But to dissect evidence on the same side and single out facts, is not tolerated. *Piper v. Wade*, 57 Ga., 223; *Sheibley v. Hill*, Id., 233. Evidence, however weak, if it tend to prove a point, must not be excluded. *R. R. v. Moore*, 51 Ala., 394. And a charge must not withdraw from the jury a material element of the offense alleged. *Jordan v. State*,

52 Ala., 183; or single out fact in criminal prosecution for the prisoner. *Adams v. State*, Id., 379. And an instruction must state all facts necessary to be proved. *R. R. v. Britz*, 72 Ill., 257. Nor must an undue prominence be given to a particular fact. *Calef v. Thomas*, 81 Ill., 479. And the fact of a *condition* attached to an offer to extend a time of payment must not be ignored. *Smith v. School District*, 17 Kan., 315.

⁴ *Long v. State*, 1 Tex. Ct. of Appeals, 718.

⁵ *Walters v. R. R.*, 41 Ia., 77.

⁶ *McDonald v. Beall*, 55 Ga., 289.

⁷ *Regular v. State*, 58 Ga., 265.

The exception is, that if the facts assumed are admitted by the parties, so as to go to the jury as undisputed points, the court then has a right to assume their existence,⁸ but it is not so as to any disputed facts⁹ And the viciousness of such an instruction does not lie in its error as to the law, but in its tendency to mislead even if it states the law correctly.¹ Thus an instruction, in a case of trespass, that the jury might give punitive damages if they should find for the plaintiff, and if they find furthermore that the trespass was committed wantonly or willfully, whereas, there is no element of willfulness or wantonness in the case, is fatally vicious.²

The following illustration is derived from an Illinois case, in which the syllabus is as follows: "In an action against a railroad company to recover for a personal injury in being put off the cars of the defendant, the issue made by the parties was whether the conductor put the plaintiff off the cars while it was in motion. The court instructed the jury as follows: 'The jury are instructed that if they believe from the evidence that the plaintiff had not paid or offered to pay his fare from Elkhart to South Bend, then the defendant would not be warranted in throwing the plaintiff from the train in a way to endanger his life or limb, or throw him off while the train was in motion.' *Held*, that the instruction assumed as fact the very matter in contest and was calculated to prejudice the defendant."³

An instruction assuming that there was a certain general usage or custom, instead of leaving this to be determined by the jury, is error.⁴

§ 30. It is also requisite that instructions be clear and certain and not doubtful or ambiguous. And especially is care requisite where oral charges are allowed, which, however, I think ought never to be the case. But on this the Michigan court remarks in condemnation of too great a multiplica-

⁸ Mathews v. Story, 54 Ind., 418.

⁹ Starkey v. De Graff, 22 Minn., 432.

¹ Van Tayle v. Quinton, 42 Ia., 459.

² Waldron v. Marcier, 82 Ill., 553.

³ R. R. v. Shelton, 66 Ill., 424.

⁴ Wilson v. Bauman, 80 Ill., 493.

ity: "We deem it proper to suggest, as has been done before on several occasions, that the multiplication of points and requests in cases where the issues are not complicated is of injurious tendency and calculated to confuse both courts and juries and impede the administration of justice. The jury must act in their deliberations on the understanding which they derive from a single hearing of the charges and requests; unless made plain to their understanding and expressed in such language as requires no interpretation to the laity, there is much danger that they will either be misled or disregard the instructions altogether, and decide the case on what they conceive to be its general equities."⁵ And, so, a request which is prolix, verbose, and confused, may be and ought to be, rejected,⁶ however correct its meaning may be, when it has undergone the requisite interpretation; for, the very purpose of an instruction is to give the jury a clear and reliable view of the law, so as to enable them to return an intelligent verdict on the matter in controversy,⁷ and so it should not be couched in ambiguous language, or be of doubtful meaning,⁸ or of deficient compass,⁹ for herein there may be injurious sins of omission as well as commission.¹

§ 31. Usually, therefore, but not always, general instead of specific charges are objectionable, as they are quite likely to go nowhere. In Georgia it has been held that a charge on the failure of a party to produce evidence available to him is sufficiently definite and intelligible when it announces as the presumption of law that the evidence, if produced, would be prejudicial to the party. If one desires a further statement of the respect in which, and the extent to which, this presumption would prejudice, he must specifically request a full explanation. And then the jury, and not the court, must decide whether the pending cause is one in which such pre-

⁵ *Manufacturing Co. v. Vroman*, 35 Mich., 332.

⁶ *Brinkley v. State*, 58 Ga., 296.

⁷ *McKinney v. Snyder*, 78 Pa. St., 497.

⁸ *Henry v. Davis*, 7 W. Va., 715.

⁹ *Gas Co. v. Wheeling*, 8 W. Va., 368.

¹ *Mitchell v. State*, 2 Tex. Ct. of Appeals, 404.

sumption arises, since the existence of the absent evidence and the ability of the party to produce it are essentially matters of fact.²

In Alabama, it is held that where the evidence of a material fact is conflicting, it is error for the court to give a mere general charge.³ Sometimes, however, both general and special charges may be given, and they are to be considered together.⁴

In criminal trials it is not sufficient for the judge to charge the general principles defining the offense charged, but he must instruct them on the law of the particular case that the law as applicable to the evidence, where it is the independent duty of the court to charge at all without requests,⁵ including of course, an instruction as to the nature, elements and ingredients of the offense.⁶ In a civil cause if a party desires a more full and definite charge on any point it is usually incumbent on him to make request to this end.⁷ Where there is a distinct request it is held the court must be equally explicit, and it is error to tell the jury merely that they have a right to consider all the circumstances attending the examination of the witnesses on the trial and to weigh their testimony accordingly;⁸ that is where the judge is not bound to follow the exact words of the request, as in some states, he is bound.

§ 32. As it regards the hypothetical instructions, it is held that the hypothetical is in general the proper form—that is, where the evidence tends to prove a particular state of facts the party has a right to request an instruction on the hypothesis of such state of facts, but in a manner to leave the jury to determine whether the facts are really proved by the evidence.⁹ But if irrelevant testimony has been introduced, the court is not allowed to give instructions based on hypotheti-

² *Nichol v. Crittenden*, 55 Ga., 498.

³ *Moore v. Faggard*, 51 Ala., 525.

⁴ *Hemmingway v. Garth*, Id., 530.

⁵ *Miles v. State*, 2 Tex. Ct. of Appeals, 511.

⁶ *Smith v. State*, Id., 517.

⁷ *Watkins v. Paine*, 57 Ga., 50;
Morgan v. Smith, 77 N. C., 37.

⁸ *Hill v. Sprinkle*, 76 N. C., 353.

⁹ *Kendall v. Brown*, 74 Ill., 232.

cal cases supposed to have been made by such evidence.¹ But a material fact may be stated hypothetically as above stated, leaving the jury to find whether it exists or not.² The hypothesis must be warranted by the testimony.³ But care must be taken not to state evidence itself hypothetically so as to leave it to them to decide whether it is pertinent to the issue, and instruct them that it is to be considered by them if they judge it applicable and otherwise disregarded.⁴

§ 33. As to repetitions, they are not favored; so that the refusal of a court to charge what has been already charged is not error, even if this reason is not assigned for refusal.⁵ And if an instruction is given at the instance of one party, the court does not need to give it at the instance of the other,⁶ nor even if the phraseology is different,⁷ nor although it may contain a correct legal proposition,⁸ the purport being the same with that of another already given.⁹ And, so, where it has been charged what the legal consequences of certain facts will be, the court cannot be required to repeat it with needless or immaterial variations.¹⁰ In regard to this matter there is no conflict among the authorities, and I deem it needless to pursue it further.

§ 34. But as to additional instructions, they may properly be given even after the jury have retired; these may be recalled; or they may voluntarily return for additional instructions when it is evidently necessary. And in Massachusetts it has been held that it is fully within the discretion of the presiding judge to recall a jury and restate the law and evidence to them, even if they had been asked if they desired any instructions on the law, and they replied they did not.¹¹ Also, in that state it has been held, that the judge may re-

¹ *Evans v. George*, 80 Ill., 51.

² *Steele v. R. R.*, 43 Ia., 109; *Little v. McGuire*, 111, 417.

³ *Hutchins v. Masterson*, 43 Tex., 551; *Johnson v. Bell*, 74 N. C., 355.

⁴ *People v. Ivey*, 49 Cal., 56.

⁵ *Spencer v. Humiston*, 9 Hun., 71.

⁶ *R. R. v. Goddard*, 72 Ill., 568.

⁷ *Earl v. People*, 73 Ill., 330.

⁸ *Holcomb v. People*, 79 Ill., 410; *Chicago v. Brophy*, Id., 277.

⁹ *Hopper v. Moore*, 42 Ia., 563; *Belair v. R. R.*, 43 Ia., 674.

¹⁰ *Vason v. Beall*, 53 Ga., 500.

¹¹ *Nichols v. Munsel*, 115 Mass., 567.

verse or withdraw an instruction previously given, without the consent of the parties; and, so with a ruling on the trial.¹ But a court, of course, is under no obligation to give any additional charge, except when necessary, and on a material point,² nor to state what has already been given in more emphatic language.³ Where a jury requests a re-charge, the court may properly confine the additional instruction to the point specified by them in their request.⁴

§ 35. In some states, the court in charging is strictly confined to the requests made by the parties and cannot even modify such requests, but must either give them or refuse them altogether;⁵ in other states, the court may refuse requests and substitute its own charge;⁶ in others again, the court can charge *sua sponte* by consent of the parties only.⁷ In some states requests must be in writing, in others not. These distinctions, I think, need not be pressed here.

§ 36. But there are some very close restrictions at times, and some that seem impracticable; as in North Carolina the Supreme Court seems to regard it as within its legitimate province to revise the emphasis, looks, tones and manner of the judge in delivering an oral charge in a court below⁸—a jurisdiction which looks to me decidedly shadowy. In Georgia it is held that a judge should not, in a murder case, characterize the deceased as a “victim”⁹—which seems to be a tangible restriction. And in Illinois it is judged improper to underscore words in a written instruction;¹⁰ and very wisely I would think.

§ 37. Where there is a series of instructions, they should be construed together. And if, under such construction, the whole is correct, even if a part taken together would be incorrect, there is no vitiating error.¹¹ And so, if an instruction

¹ *Eldridge v. Hawley*, Id., 410.

² *Insurance Co. v. Francis*, 52 Miss., 458.

³ *R. R. v. Kunkel*, 17 Kan., 145.

⁴ *O'Shields v. State*, 55 Ga., 696.

⁵ *Eiland v. State*, 52 Ala., 322;
Carson v. State, 50 Ala., 135.

⁶ *Cusman v. McDonald*, 28 Ark., 8.

⁷ *Bates v. Ball*, 72 Ill., 109.

⁸ *State v. Butner*, 76 N. C., 118.

⁹ *Hayes v. State*, 58 Ga., 36.

¹⁰ *Wright v. Brosseau*, 73 Ill., 381.

¹¹ *Kauffman v. Adm'r*, 9 W. Va., 633.

given on behalf of one party is of doubtful construction, an instruction on behalf of the other may remove the doubt and then there is no error.⁵ Objection to part will not vitiate the whole where the whole present the law fairly and justice is done by the verdict.⁶ And, so, if there is an omission in one part, but supplied by another, the defect is thus remedied.⁷

The rule extends to a modification of a request by the court, where such is allowed. The meaning of the modification is regulated and controlled by the entire charge, all construed together.⁸ And the rule also extends to trials for capital crimes⁹ in which an ambiguous instruction can be cured by a clear one.¹⁰

And, so, if the entire charge harmonizes as a whole and correctly presents the law, a new trial will not be granted merely because a separate instruction does not contain all the conditions which may be gathered from the entire series.¹¹ And, indeed, it is not requisite to insert in each separate instruction all the exceptions, limitations and conditions inserted in the charge taken as a whole.¹² And if the law is not stated with precise accuracy in one it may be corrected in another.¹ But if the clashing between the two merely amounts to a contradiction the discrepancy is fatal in all cases.² The essential requisite is that when taken together they correctly give the law of the case.³

In Missouri the rule seems not to apply to a trial for capital crime, at least in regard to a description of the offense, wherein it is held that the giving of an instruction omitting the elements of malice and premeditation will operate a reversal, even though another instruction correctly describes the crime.⁴ In Indiana it is held that an erroneous instruction cannot be cured by another which states the law correctly, unless the

⁵Latham v. Roach, 72 Ill., 179.

⁶Gilchrist v. Gilchrist, 76 Ill., 231.

⁷State v. Maloy, 44 Ia., 104.

⁸Merriam v. Lumber Co., 23 Minn., 314.

⁹State v. Raymond, 11 Nev., 98.

¹⁰State v. Ah Mook, 12 Nev., 369.

¹¹People v. Doyell, 48 Cal., 86.

¹²People v. Welch, 174.

¹People v. Cleveland, Id., 578.

²Insurance Co. v. Earle, 33 Mich., 147.

³Krech v. R. R., 64 Mo., 172.

⁴State v. Mitchell, 64 Mo., 191.

latter plainly withdraws the former.⁷ And so it is declared in Pennsylvania, that obscurity may be cured but not palpable error.⁸ In Colorado error cannot be cured.⁹

§ 38. Whether an instruction may be argumentative or not has been somewhat variantly decided. In Illinois it has been held that, although a request for an instruction may contain some good law, yet it is not error to refuse it if it be voluminous and is rather an argument of counsel than anything else.¹ In Georgia it has been held that the court in delivering an oral charge should not assume an argumentative manner, the purpose of the charge being to state and explain the law and not to carry on a process of general reasoning.² And hence the court cannot be required to read to the jury from a law-book.³ Nor is the court to turn teacher of logic and instruct the jury how to reason and draw inferences. On this the Texas Court of Appeals tersely remarks that "the jurors being made by law the exclusive judges of the evidence are deemed to have capacity enough to exercise their processes of thought and powers of combination sufficiently to weigh facts and determine their importance and relation to each other in arriving at conclusions, without any assistance of the judge in directing them how to ascertain the truth of disputed facts by the relation they bear to facts established."⁴ In Texas, however, the judge in charging is allowed to employ logic but not rhetoric—the Code prohibiting only such arguments as are calculated to arouse the sympathy or excite the passions of the jury.⁵ Some of the ancients on like principle required all deliberative assemblies to do their work in the night time and without artificial lights, so they should steer clear of oratory and passion. In Illinois it is held that it is improper for a judge to make any remark in the hearing of the jury calcu-

⁷R. R. v. Shuckman, 50 Ind., 42.

³Houser v. State, Id., 78.

⁸Murray v. Commonwealth, 79 Pa. St., 312; Rice v. Olin, Id., 391.

⁴Lindsay v. State, 1 Tex. Ct. of Appeals, 329—but a very violent presumption in the case of some juries.

⁹Mackey v. People, 2 Col., 13.

¹Thompson v. Force, 65 Ill., 370.

²Hayes v. State, 58 Ga., 36.

⁵Cesine v. State, Id., 19.

lated in anywise to bias their deliberations.⁶ In Georgia it has been declared, however, that a court may justifiably excite the intellects of a jury to a quick perception of things by means of a brief exhortation, or, at least, suggestion, on the importance of the case, the trouble it has given and the desirableness of disposing of it by a final verdict.⁷ In Massachusetts it seems in place for a judge to tell the jury, at least in answer to a question on it, that "brains" are not "appliances."⁸

§ 39. Where a defendant on trial withdraws the general issue it is error for the court to charge that he has thus admitted all the material allegations of the declaration, without stating what those material allegations are.⁹

§ 40. In a case where the evidence is conflicting, the series of instructions on each side should be correct in themselves. Each party has a right to an instruction, or a series, based merely on hypotheses, including his own evidence, and so the fact that the law is accurately stated on one side will not cure a defect on the other.¹

§ 41. The competency and admissibility of evidence belong to the court, but the credibility, weight and sufficiency belong exclusively to the jury, and are therefore not the proper subjects of instructions. The Maryland Court has decided that where the matter of competency is doubtful it may be referred to the jury.² But herein it stands entirely alone, I think, for it belongs to the court to admit evidence, and, as preliminary to this, to determine the competency of a witness. And so absolute is this that the court is under no obligation to inform the jury for what purpose the evidence is admitted, necessarily, and even where this is proper to be done the omission to do it does not render erroneous the admission of the evidence.³

The court has no right in a criminal case to designate a particular witness, not an accomplice, and caution the jury to avoid,

⁶Skelly v. Boland 78 Ill., 433.

⁷Allen v. Woodson, 50 Ga., 53.

⁸Summersell v. Fish, 117 Mass., 312.

⁹McClure v. Williams, 65 Ill., 390.

¹R. R. v. Moffit, 67 Ill., 432.

²Spencer v. Trafford, 42 Md., 17.

³Lipprant v. Lipprant, 52 Ind., 273.

giving credence to it.⁴ And, in a civil case, cannot intimate anything which would seem to characterize evidence as "loose talk."⁵ In Kansas it has been held that where an instruction is requested that if a particular witness, naming him, has willfully testified falsely, etc., the court may properly modify it so as to state that if *any witness* has, etc.⁶ In North Carolina it is held error to charge as a *rule of law* that the presumption is that men will testify truly and not falsely.⁷ But in Texas, where one jointly indicted was permitted to testify, it was held proper for the court to instruct the jury "to give the evidence such credit as they believed it entitled to, and that the presumption was that all the witnesses testified correctly."⁸ In Georgia it is fatal error to charge the jury that a certain witness was "apparently interested,"⁹ or to express any opinion as to what evidence is most credible,¹⁰ or to charge the jury that if they believe the evidence for the state they must find the defendant guilty.¹¹ It does not belong to the court, in any case where there is conflicting evidence, to decide upon the sufficiency of that on either side.¹² A jury, however, may properly be cautioned to discriminate the evidence from all other statements before them.¹³

As to the weight of evidence, it has been held in Missouri proper to instruct the jury that certain evidence has a tendency to prove certain facts, but not to estimate the weight thereof for them.¹ Unless the evidence is of a character conclusive in law, the judge should abstain from intimating in any manner an opinion as to its weight.² And there is no difference, in this regard, between oral and written testimony.³ And the court may properly refuse to instruct the jury that, "if the evidence of the plaintiffs impressed their minds as being so unreasonable as to remove a fair presumption of the truth of

⁴ Rafferty v. People, 72 Ill., 38.

⁵ Cutler v. Callison, 72 Ill., 113.

⁶ State v. Kellerman, 14 Kan., 135.

⁷ State v. Jones, 77 N. C., 520.

⁸ Morgan v. State, 44 Tex., 511.

⁹ Lellyet v. Markham, 51 Ga., 13.

¹⁰ Davant v. Carlton, Id., 489.

¹¹ Habersham v. State, 56 Ga., 61.

¹² R. R. v. Williams, 52 Ala., 278.

¹³ Bank v. Kent, 57 Ga., 235.

¹ Beattie v. Hill, 60 Mo., 72.

² Frame v. Badger, 79 Ill., 447.

³ Luke v. Calhoun Co., 52 Ala., 115

the statements made by the plaintiffs, they should find for the defendants.”⁴ A charge that evidence of the admissions of a party is dangerous, and liable to abuse, has been held error as a charge upon the weight of evidence.⁵ And where the charge was that “a witness who swears positively that a certain state of facts is true, is entitled to more weight than half a dozen others who cannot swear positively, but who testify that they do not believe them to be true,” the Supreme Court characterized it as a charge upon the weight of evidence, an unnecessary and improper interference with the province of the jury, and a gratuitous aid tendered to them, which should never appear in the charge of a court.⁶ And the Texas Appellate Court reminds trial courts of the value of brevity as a means of avoiding the error of commenting on the weight of evidence.⁷ And it has also held that an instruction that confessions voluntarily made, or which led to the discovery of stolen property, are the strongest and most satisfactory evidence, is erroneous, being a charge on the weight of evidence.⁸ The judge must not only abstain from expressing, but also from intimating an opinion on this matter.⁹ Where the court refused a request to charge that a certain “auditor’s report is evidence in behalf of the defendant, it is entitled to the same weight as a promissory note put into a case after proof of its making and signature; it makes out a *prima facie* case for the defendant,” the refusal was held proper.¹⁰ And, so, a court is not to single out a witness and instruct that, if the testimony of that witness is believed, the verdict should be for a particular party;¹ and ought to refuse to tell the jury that, “under the evidence in this case they cannot convict the defendant of murder in the second degree,”² and abstain from informing the jury that certain evidence introduced on the trial was of but little value, and giving the reasons therefor.³

⁴ Palmer v. Miners, 17 Kan., 478.

⁵ Castleman v. Sherry, 42 Tex., 59.

⁶ Sparks v. Dawson, 47 Tex., 139.

⁷ Gibbs v. State, 1 Tex. Ct. of Appeals, 12.

⁸ Harris v. State, Id., 74.

⁹ Merritt v. State, 2 Tex. Ct. of Appeals, 177.

¹⁰ Rupe v. Burnell, 121 Mass., 450.

¹ R. R. v. Judson, 34 Mich., 507.

² State v. Potter, 16 Kan., 82.

³ Wannack v. Macon, 53 Ga., 162.

And, so, in a case where on the one side the party testified and there was no other testimony, and on the other side was the testimony of a disinterested witness, the court held that it was improper to charge that those witnesses were to have the preference whose means of information were the best, and who had the best opportunity to notice and remember the circumstances, or that in the absence of uncorroborating circumstances, if all the witnesses were in the same circumstances, and were alike in everything but numbers, the evidence of two would overcome the evidence of one, and the jury would be bound to believe the two in preference to the one.⁹

On general grounds, it is erroneous to instruct the jury that in order to reconcile a conflict in the evidence, they may resort to inference of a fact not proved.¹

But a court may give a charge concerning the burden of proof.² And, also, may instruct that the jury are bound to believe the evidence, unless impeached or discredited.³ But it should not say that a certain fact makes "not a slight but a strong circumstance."⁴ Nor can the judge properly say, "If you believe every word of evidence for the defense, and disbelieve all the evidence for the State, I charge you the prisoner is guilty, but of course you can look to all the evidence and make up your verdict on it."⁵ And charges should not be commentaries on the evidence in any way,⁶ either in whole or in part.⁷ Nor should a judge give his estimate of a particular witness, as that he "is a man of high character in his profession, and appears to be a man of culture."⁸

The authorities are almost unanimous on these points. But in Pennsylvania a judge is allowed to give his opinion on the facts, though in a way not to mislead them or relieve them from any degree of their responsibility of judging and rendering a verdict—a medium exceedingly difficult to maintain, I should

⁹ *Amis v. Cameron*, 55 Ga., 450.

¹ *Henderson v. State*, 49 Ala., 20.

² *Hill's Adm'r v. Nichols*, 50 Ala., 336.

³ *Rowland v. Plummer*, Id., 183.

⁴ *Warmuck v. State*, 56 Ga., 503.

⁵ *White v. State*, Id., 385.

⁶ *State v. Allen*, 64 Mo., 67.

⁷ *State v. Jones*, Id., 391.

⁸ *Crutchfield v. R. R.*, 76 N. C., 320.

suppose.⁹ And, in Minnesota, a court may say that certain facts are "strong evidence," or "evidence of great weight,"¹ if it does not determine the degree of strength or weight.

§ 42. If, however, the plaintiff in a case furnishes no relevant evidence, the court may *direct* a verdict for the defendant; or if a party is omitted who ought to be joined, it has been held the matter may be specially referred to the jury, with directions to find against the defendant, if they believe from the evidence that there has been such non-joinder.² But this is plainly anomalous, and perhaps would not be held outside of the District of Columbia now, especially under the usual practice statutes allowing amendments *ad libitum*.

But where there is no evidence, the verdict may be directed,³ that is, where all the facts in evidence taken as true, and all the legitimate inferences which may be drawn from them, manifestly fail to maintain the issue.⁴

§ 43. Where a request has been refused, or is about to be refused, it should not be read in the hearing of the jury.⁵

CHAPTER III.

BILLS OF EXCEPTION.

§ 44. It is not allowable to make objections for the first time in the appellate court; they should be made below, and at the time of the ruling on the trial of the cause.⁶ And they

⁹Burke v. Adm'r., 81 Pa. St., 139.

¹McArthur v. Craigie, 22 Minn., 352.

²Snyder v. Finley, 1 McArthur, 220.

³Lalonette's Heirs v. Lipscomb, 52 Ala., 570.

⁴Whitney v. Cook, 53 Miss., 551.

⁵Ransone v. Christian, 56 Ga., 352; Beach v. Branch, 57 Ga., 362.

⁶Hofmeier v. Campbell, 59 N. Y., 269; Osgood v. Toole, 60 N. Y., 475; Jones v. Ins. Co., 61 N. Y., 79; Gardner v. Hazelton, 121 Mass., 494; Frink v. Alsip, 49 Cal., 103; and in equitable matters, Palis v. Tice, 28 N. J. Eq., 432; and in general, Payne v. Flowinoy, 29 Ark., 500; Roop v. Delahaye, 2 Col., 307; McCraw v. Welch, Id., 284; Schwartz v. Ins. Co., 21 Minn., 215.

must be specific or special, and those which are not specified at the time must be considered waived. Thus, where an instrument is offered in evidence, and is objected to on one ground which is overruled, and fails to object specially that the execution was not proved, he will not be allowed to urge this ground of objection afterward.² And, so, where specific objections are made at the time to instructions, others which might have been urged will be considered waived.³ And, if evidence be admitted without objection by the opposite party, it will be held that he consented to it;⁴ and even in a criminal case.⁵ And so with a refusal to suppress a deposition.⁶ And so as to a verbal charge.⁷ In Rhode Island the objections must be urged before verdict.⁸

The only questions open, then, in the appellate court, are those presented in the bill of exceptions, or the record itself.⁹ A sensible reason is given for this by the Vermont Court, namely: "It is to be assumed, where specific points are made and ruled, and judgment rendered and exception taken, that other questions that might have been made but were not were regarded by the county court as waived. *Non constat* if they had been made the judgment would have been such as it was, and the cause have been here on exceptions. Otherwise, causes may come here, and litigation be protracted upon points and questions raised here for the first time, and that did not (and that, too, without any error in the court below) enter into the grounds of the decision. This would not be ingenuous towards either that court or this, and would not be ingenuous and fair towards the other party either in that court or this. It is ordinarily regarded as sufficient for the party to meet and take care of the points and questions that are made against him on the trial in the county court, and that the county court has done all its duty to both parties when it has decided the points

² Botkin v. Livingston, 16 Kan., 39.

³ Price v. R. R., 42 Ia., 16.

⁴ Reid v. Hawkins, 46 Ind., 222.

⁵ State v. Stickley, 41 Ia., 232.

⁶ Hutts v. Hutts, 51 Ind., 581.

⁷ Vanwey v. State, 41 Tex., 639;

Mooring v. State, 42 Tex., 85.

⁸ State v. R. R., 11 R. I., 361.

⁹ Withee v. Brooks, 65 Me., 14; Sargent v. Machias, Id., 591.

and questions made by each party against the other. Unless court and counsel are apprised in the court below that other matters, and what, are relied on as ground of objection and exception to the judgment, this court will not knowingly entertain and consider questions as to such other matters.”¹

The rule is thus accurately stated by the Supreme Court of the United States: “Errors of the Circuit Court resting in parol cannot be re-examined in this court by writ of error. Instead of that the writ of error addresses itself to the record, and the rule is that whenever the error is apparent on the record, whether it be made to appear by bill of exceptions or by demurrer, the error is open to re-examination and correction. Whatever error of the court is apparent in the record, whether it be in the foundation proceedings, judgment or execution of the suit, may be re-examined and corrected, but neither the rulings of the court in admitting or excluding evidence, nor the instructions given by the court to the jury are a part of the record, unless made so by a proper bill of exceptions.”² Thus, if a case is called and tried out of its proper order, this is not a matter of record, and the point must be preserved by a bill of exceptions.³ But where, under a statute, the jury gives in a general verdict for plaintiff, and returns special verdicts on interrogatories proposed, inconsistent with the general verdict, and thereon the court renders judgment for the defendant, and the plaintiff brings up the case to the appellate court, no bill is necessary, the whole being a matter of record.⁴ The ruling of a court to dismiss for want of a sufficient bond must be preserved by bill.⁵

An objection must usually be formal and specific. A mere statement to a court reporter that an exception is taken will not suffice for any purpose.⁶ The Michigan Court say that “the practice of taking general and obscure exceptions at the

¹ *State v. Preston*, 48 Vt., 12; *Yates v. Pelton*, Id., 317.

² *Storm v. U. S.*, 94 U. S., 76.

³ *Bill v. Mulford*, 80 Ill., 82.

⁴ *Dimick v. R. R.*, 80 Ill., 338.

⁵ *Hyatt v. Brown*, 82 Ill., 23.

⁶ *Coleman v. Gilmore* 49 Cal., 340.

moment, in order to cover the case, and enable counsel on subsequent critical examination to raise points under the exceptions which have never been suggested at all to the mind of the trial judge, is objectionable on many grounds, and is contrary to the theory upon which points are allowed to be raised by exceptions.”⁷ The United States Supreme Court say in a certain case: “If a special exception in proper form had been taken to this ruling, we might possibly have been inclined to hold under the stipulation in the case as to the pleadings that it was equivalent to a special finding of the conveyance to Mrs. Lea, and a judgment notwithstanding in favor of the plaintiff for the value of the remaining houses covered by the policy. But there was no such exception. The words are ‘exceptions allowed;’ that is all; there is nothing specific; everything is general. If the exception amounts to anything it covers the whole record. Such a practice never has been and ought not to be sanctioned by this court. Exceptions to be of any avail must present distinctly and specifically the ruling objected to. A case ought not to be left in such a condition after a trial that the defeated party may hunt through the record and if he finds an unsuspected error attach it to a general exception and thus obtain a reversal of the judgment upon a point that may never have been brought to the attention of the court below. Such a result might follow if the form of exception here adopted should be allowed. We are not inclined to depart from a rule which has so long been recognized here, and which has been found so beneficial to litigants as well as the courts.”⁸ And the Ohio court say: “It seems to be well settled, both upon principle and authority, that in excepting to the charge of a judge [or any ruling either] the party excepting should at the time point out definitely the part of the charge excepted to, and state the grounds upon which he excepts; and it is equally well settled that unless the exception directs the attention of the judge to the portion or proposition of the charge

⁷Turner v. People, 33 Mich., 382.

⁸Insurance Co. v. Sea, 21 Wall., 161.

excepted to, and shows specifically and distinctly the grounds of the exception, a reviewing court is not bound to take any notice of the exception, nor to look beyond the grounds of the exception thus stated. In *Bain v. Whitehaven & Furness Junction Railway*, 3 House of Lords Cases, 16, Lord Brougham held: 'It is necessary that when a party excepts to the rejection of evidence or to the direction of a judge given to the jury, whatever is the subject matter of his exception, he must state the grounds of his exception; otherwise he cannot except. It is not enough for him to say 'I except to the receiving of A's evidence,' or 'I except to the rejection of A's evidence,' or 'I except to the first passage in the direction given by the learned judge to the jury. In all these cases the ground of the objection must be clearly stated, and beyond the ground of the objection thus stated the court is not bound to look.' In *Jones v. Osgood*, 2 Seld., 233, it was held: 'A general exception "to the whole charge of a court and to each part of it" when the charge contains more than a single proposition of law and is not in all respects erroneous, presents no question for review on appeal.' These rules, it is said, have their foundation in a just regard to the fair administration of justice, which requires that when an error is supposed to have been committed there should be an opportunity to correct it at once, before it has had any consequences, and does not permit the party to lie by without stating the ground of his objection, and take the chances of success on the grounds on which the judge has placed the cause, and then if he fails to succeed avail himself of an objection which if it had been stated might have been removed."⁹

In Indiana, it is required that each distinct proposition of law be numbered, and then it is sufficient to mark, under each number, a general exception. But the court says, in regard to it, that "it was not the intention that exception should be thus taken *en masse* to an entire series of instructions, but that the exception should be noted at the 'close of each instruction.' Hence, the statute requires them to be numbered

⁹ *Adams v. State*, 25 Ohio St., 587.

which might have been required by either of the parties, and they should be so separated and numbered as that each charge or number shall contain, as near as may be, but one entire proposition. Where the charges are thus separated and numbered counsel can at once determine to which they wish to except, and should exception be taken to each the court will be advised that all are excepted to, and not be compelled to grope in the dark for supposed errors lurking somewhere in the series of charges but not located by the exceptions upon any particular one."¹ A general exception must, necessarily, be insufficient, where the charge is not confined to a single question but covers several distinct and separate matters.²

The Arkansas court pertinently asks: "By excepting to an entire charge containing ten different declarations of law, does the appellant lay his finger on the error complained of if any one of the charges is good?"³ Justice to the court and to the opposite party requires specification.⁴ And so a merely general objection to a charge as a whole should not be noticed.⁵ However, where there may be a rule of court that written instructions shall be passed upon by the opposite counsel and settled then by the court, a general exception, it is held, may be allowed;⁶ and especially if they are formally discussed, as I believe is the case in Kentucky. If, also, an entire charge is erroneous in its general scope and meaning, it may be objected to in general terms in Kansas,⁷ and Wisconsin.⁸ If all the instructions refused are proper and should have been given a general exception will suffice.⁹

§ 45. A bill of exceptions must be filed by a party to the suit, and one is not a party who has not been served with notice or made an appearance.¹⁰ Also, the rule is that the bill must be filed in the county where the ruling excepted to was

¹ *Sherlock v. Bank*, 53 Ind., 74.

² *Lange v. Kaiser*, 34 Mich., 317.

³ *Crisman v. McDonald*, 28 Ark., 15.

⁴ *Harris v. Harris*, 53 Ga., 682.

⁵ *Brown v. Kentfield*, 50 Cal., 131;
Irvin v. State, 50 Ala., 181.

⁶ *Robinson v. R. R.*, 48 Cal., 425.

⁷ *Wheeler v. Joy*, 15 Kan., 389.

⁸ *Butler v. Carnes*, 37 Wis., 61.

⁹ *Ocheltree v. McClung*, 7 W. Va.,
233.

¹⁰ *Reed v. Canal Co.*, 65 Me., 55.

made, as for example, if a cause is removed to another county from that in which it was instituted, and thence remanded, an exception cannot be filed in the county to which it is returned, as to the order remanding the cause, even if the same judge presides in both counties.¹

As to the time of filing, it is held that, except by consent of parties, the court cannot grant permission to file in vacation,² or even extend the time for filing beyond that prescribed by statute, except by agreement,³ the court having, in such case, no power to prescribe the time.⁴ But, if there is no statutory regulation the time may be fixed by rule of court,⁵ and then the time is imperative. But time may, in any event, be extended by consent.⁶ Sometimes under a statute the judge has a discretionary power to allow a filing *nunc pro tunc*, as in New York.⁷ Filing may precede signing in California;⁸ but if a bill is presented for settlement after the expiration of thirty days from the date of the judgment, and the opposite party objects that it is too late, the court must incorporate therein a clause showing an extension of time as an excuse for the delay, or else the bill cannot be considered by the appellate court, even if settled.⁹

Usually a bill must be signed, and a judge cannot arbitrarily refuse to sign it, if it correctly sets out the facts.¹⁰ Without such signature, usually the appellate court will not act on it.¹¹ A mandamus will lie to compel the judge to sign a true bill,¹² because signing and sealing is a mere ministerial act in such a case. But a mere qualified and temporary refusal will not justify a mandamus; the refusal must be absolute, and if his reason is that the bill is not a true one, no writ of mandamus will issue, since he has a right to determine the truth

¹ McMahan v. Spinning, 51 Ind., 192.

² Mentzurg v. R. R., 64 Mo., 25.

³ Lynch v. Kennedy, 42 Ia., 220.

⁴ Harper v. Harper, 10 Bush., 447.

⁵ Dale v. Patterson, 63 Mo., 98.

⁶ Walker v. Moors, 122 Mass., 501.

⁷ Douglas v. Douglas, 7 Hun., 275.

⁸ Marble v. Fay, 49 Cal., 585.

⁹ Higgins v. Mahoney, 50 Cal., 444.

¹⁰ Bell v. State, 2 Tex. Ct. of App., 215.

¹¹ Commonwealth v. Hall, 8 W. Va., 259.

¹² Jackson v. Clark, 52 Ga., 53.

of the bill for himself, and cannot be compelled to affix his signature to a false statement.⁵ Also, the farce of sealing with a scrawl seal is usually held as necessary as signing.⁶ As to the time of signing and sealing, it may by agreement be in vacation,⁷ but without agreement, perhaps the rule is that it should be signed at the term wherein the judgment was rendered, but it is not necessary it should be done during the trial. This would be impracticable. The noting of the exception is all that is requisite at the moment.

Where nothing appears to the contrary, it will be presumed that the bill was duly signed, although it was not filed until after the expiration of the term of office of the judge who tried the cause.⁸ The filing does not govern the presumption as to signing.⁹

A judge cannot sign by deputy. It must be signed by a judge who presided at the trial or by his successor in office.¹⁰

The signature imports absolute verity, so far as the statements go, although it may be inquired whether it is *defective* in not containing all it should contain.¹¹

In Indiana, however, when instructions are refused, and then signed by the party or his attorney, and noted as refused and excepted to the note, also signed by the party or his attorney, the instructions become a part of the record without the signature of the judge.¹² But this seems to be exceptional. And in Missouri, if the judge fails to sign a bill in a criminal case where error is apparent on the face of the record the cause will be remanded,¹ or perhaps anywhere.

In all cases if the signature is affixed in due time, the filing may be subsequent.² In Oregon, the presenting, allowing and signing may be at any time prior to the first day of the next term of court.³ The United States Supreme Court very sensibly dispenses with the unmeaning scrawl seal.⁴

⁵Jelley v. Roberts, 50 Ind., 3.

⁶Rhinehart v. State, 45 Md., 454.

⁷R. R. v. Ragsdale, 51 Miss., 447.

⁸Bowen v. Preston, 48 Ind., 367.

⁹Goodrich v. Cook, 81 Ill., 41.

¹⁰R. R. v. Rogers, 48 Ind., 427.

¹¹Brown v. Johnson, 14 Kan., 377.

¹²Etter v. Armstrong, 46 Ind., 197.

¹State v. Barnett, 63 Mo., 300.

²Eldred v. Malloy, 2 Col., 20.

³Halcomb v. Teal, 4 Oreg., 352.

⁴Stanton v. Embrey, 93 U. S., 555.

§ 46. Another rule is, that injurious error must be shown. And so, if the exclusion of evidence be complained of, the bill must show that the evidence was material to the issue.¹ It must, in any case, appear affirmatively that the party filing the bill has been aggrieved.² No exception will lie to the ruling of a judge merely because it is erroneous.³ And so, if a ruling on a point of law is erroneous, and at the time apparently material, yet, if afterward, the finding of the jury is such as to render it immaterial, it will not be reviewed.⁴ And exceptions must be so fully stated as to enable the appellate court to judge of the rulings complained of or the exceptions will be dismissed.⁵ And if a refusal to the rule be excepted to, it must be shown that evidence was offered calling for such a ruling.⁶

Where a court sustains an objection to a question asked a witness on the trial, it must not only be shown on exception what was the ground of the objection, but what evidence it was intended to elicit.⁷ And if a ruling overrules such objection, the bill must show that a ground of objection was set out to the court below, what that ground was, and what was the answer of the witness.⁸ It must have been stated in the court below what fact the questioner expected to establish by the answer.⁹ And even if there are material errors, yet if the excepting party cannot prevail on account of his own errors, the exceptions cannot be sustained.¹⁰

§ 47. The principle of estoppel in a modified form applies to the matter of exceptions, as for example, one is not allowed to object to an instruction given in behalf of the opposite party which is similar to one given for himself.¹¹ And, so, if one calls on the court to decide a case as a question of law

¹ *Safford v. Grout*, 120 Mass., 20.

² *Reed v. Canal Corp.*, 65 Me., 53.

³ *State v. Pike*, Id., 111.

⁴ *Webber v. Read*, Id., 564.

⁵ *Daniels v. Woonsocket*, 11 R. I., 4.

⁶ *Buxton v. Potter's Works*, 121 Mass., 446.

⁷ *R. R. v. Rowland*, 51 Ind., 285.

⁸ *Holesapple v. Fawbush*, Id., 494.

⁹ *R. R. v. Lansing*, 52 Ind., 229.

¹⁰ *Farnsworth Co. v. Rand*, 65 Me., 20.

¹¹ *Smith v. R. R.*, 38 Ia., 173.

without requesting the submission of any question of fact to the jury, he cannot except to the finding it seems.¹

§ 48. And so a party may waive the right to except, sometimes tacitly, as in Rhode Island, by neglecting to object until after the verdict of the jury has been returned.² And one consenting to a proceeding when he might have prevented it on account of irregularity, will be considered to have waived the irregularity. So in New York, if exceptions are taken in the course of a trial, and afterward the parties consent to the directing of a verdict subject to the opinion of the court at the general term, this consent will be held to have waived the exceptions taken.³

§ 49. I find nothing which materially varies the statements in the body of this work as to what a bill of exceptions should contain, and I, therefore, pass by the greater part of the late decisions on this point, they being merely confirmatory; and make the statements below as comprising all the additional matter requisite to be given. The Mississippi court thus states the object of the bill: "The object of a bill of exceptions is to perpetuate for the use of the appellate court a full and complete history of what transpired on the trial or so much as may be needed for the purpose of revising the proceedings. It is the creation originally of the statute of Westminster the 2nd. The sole purpose is to certify to the court of review matters during the progress of the cause which are not noted in the record proper, and which in this mode becomes part of it. It is purely narrative and historical, except in the sense that it is the duty of the judge to sign and seal it."⁴ And a bill accordingly must contain all facts and circumstances pertinent and necessary to form such intelligible history.⁵ And a mere recital in the judgment rendered will not supply the place of such a bill,⁶ although in

¹ *McCall v. Ins. Co.*, 66 N. Y. 506.

⁴ *R. R. v. Ragsdale*, 51 Miss., 451.

² *Meyers v. Briggs*, 11 R. I., 180;

⁵ *Griffin v. Chadwick*, 44 Tex., 406.

Patton v. Mfg. Co., Id., 188.

⁶ *Smith v. State*, 1 Tex. Ct. of App.,

³ *Byrnes v. Cahoes*, 67 N. Y., 204.

133; *Caldwell v. State*, 2 Id., 53.

order to make a bill part of the record, the record must show its allowance and proper execution.⁷

Thus, a court will not review a refusal to grant a continuance unless the whole matter is brought in by bill.⁸ And, so, if an indictment was not presented in open court by the grand jury, or if its presentment or the style of the cause was not entered on the minutes, this must be brought in by bill.⁹ So as to admission or exclusion of evidence.¹⁰ And so a statement of facts may be required to be brought in by bill.¹¹ And the rule is the same in a misdemeanor cause.¹² And a motion for change of venue can only be made part of the record in the same way.¹³ And a charge of the court *sua motu*.¹⁴

As to documents, they must be inserted in the bill before signing, or else so closely identified as to leave no room for mistake by the transcribing officer, and also written instructions, etc.¹⁵ And the bill must omit no material part of either charge or evidence.¹ However, documentary evidence may, I suppose, usually be attached instead of inserted in the body of the bill.² The important matter is to have it clearly identified; and, in Arkansas this is allowed in regard to instructions.³ In California a deed copied in the record may be referred to and identified by the bill.⁴ But where a lease, which is the basis of a suit, is copied into the record by the clerk, and the bill of exceptions fails to show that the lease was offered in evidence, it cannot be considered.⁵

In Ohio, where testimony is made a part of the record by an agreed statement of facts, it is held there is no need of embodying the same in a bill of exceptions.⁶ And the rule ought to be applied to all documentary evidence placed on file

⁷ *Burk v. R. R.*, 26 Ohio St., 643.

⁸ *Books v. State*, 2 Tex. Ct. of App., 1.

⁹ *Alderson v. State*, Id., 10.

¹⁰ *Brown v. State*, Id., 115.

¹¹ *Ferrell v. State*, Id., 399; *Mitchell v. State*, Id., 404.

¹² *Goode v. State*, Id., 520.

¹³ *Hobbs v. State*, 44 Tex., 353.

¹⁴ *State v. Ah Mook*, 12 Nev., 369.

¹⁵ *Tuscaloosa Co. v. Logan*, 50 Ala., 503.

¹ *Crow v. Stowe*, 113 Mass., 153.

² *Woolfolk v. Wright*, 28 Ark., 1.

³ *Stirman v. Cranens*, 29 Ark., 548.

⁴ *Canfield v. Thompson*, 49 Cal., 210.

⁵ *Gilchrist v. Gilchrist*, 76 Ill., 281.

⁶ *McGonnigle v. Arthur*, 27 Ohio St., 257.

in a cause. As the Ohio Court said in the case last cited very significantly: "There appears to us no sound reason why a vain thing should be required." In Arkansas, if a case is tried exclusively on a statement of facts no bill is necessary, but otherwise, if there was additional testimony in the case.⁴ Where a court strikes pleas from the files, a bill is held necessary to preserve the evidence on which the court acted, and without it the court will not review the ruling.⁵ No material evidence in regard to any ruling must be omitted or the presumption of correctness must overrule all objections.⁶ And so a bill must contain excluded evidence where the exclusion is the ground of complaint, and in any case, where the bill does not include all the evidence introduced on the trial the presumption is that other sufficient evidence was introduced.⁷ And a bill should set out in narrative form the evidence relating to the point presented or else by a statement of its substance or what it tended to prove, and the questions to a witness should be given only where it is necessary to present an objection thereto,⁸ or to enable the answer to be understood. And where a bill sets out an affidavit supporting an overruled motion, it must negative the supposition that there was any other affidavit or evidence used or else the court will not review the overruling decision.⁹

A motion for a new trial, and in fact all motions, must be brought into the record by a bill of exceptions.¹

Where a bill sets out instructions refused, and shows the fact that others were given, the court cannot say there was error in not giving those preserved, because those which are not set out may have comprised the substance of those refused, and hence, the court below would not be bound to repeat. But if the bill sets out refused instructions and refers to no others, the court will not presume there were others.²

⁴ *Boyd v. Carroll*, 30 Ark., 527.

⁵ *Fanning v. Russell*, 81 Ill., 398.

⁶ *Glidden v. Child*, 122 Mass., 433.

⁷ *Stack v. People*, 80 Ill., 33.

⁸ *People v. Getty*, 49 Cal., 581.

⁹ *McIntosh v. Commissioners*, 13 Kan., 171.

¹ *Nisbett v. Brown*, 30 Ark., 585.

² *Ives v. Vanscoyoc*, 81 Ill., 120.

§ 50. It is held that affidavits impugning the correctness of a bill duly signed, will not be considered unless presented to sustain another bill purporting to contain a correct statement of the evidence and signed by two bystanders.³ But a bill does not import absolute verity where it is manifest that, although it professes to set out all the evidence, the statement on the face is not correct.⁴ But usually on notice and leave a bill may be amended where there is an evident mistake in recording the testimony therein.⁵

§ 51. The stipulation of parties cannot give a judge power to settle a bill of exceptions after the expiration of his term of office; but, sometimes, a court will give a new trial where the term expires before a bill can be settled, the parties not being in default in the matter.⁶

§ 52. Exceptions which are not true or which are filed after the time allowed, may properly be disallowed.⁷ But on petition, the party may be allowed to prove the truth of a bill which the judge refused to sign. And, on leave being given, he may prove some and waive others, provided the exceptions are wholly distinct and independent.⁸

§ 53. No matter of judicial discretion is exceptionable.⁹ And the mere forms of expression or immaterial remarks by the court cannot be objected to seriously.¹

§ 54. As to exceptions to evidence, there is no distinction in New York between legal and equitable actions.²

³ *Woodworth v. Byerly*, 43 Ia., 106.

⁴ *Morrow v. State*, 48 Ind., 432.

⁵ *Beckwith v. Talbot*, 2 Col., 604.

⁶ *Crittenden v. Schermerhorn*, 35 Mich., 370.

⁷ *Arvilla v. Spaulding*, 121 Mass., 505.

⁸ *Sawyer v. Iron Works*, 116 Mass., 424.

⁹ *Snow v. R. R.*, 65 Me., 530.

¹ *Ginna v. R. R.*, 67 N. Y., 596.

² *Norton v. Mallory*, 63 N. Y., 435.

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